AN ARGUMENT IN THE CASE OF JAMES SOMMERSETT, A NEGRO.

[Price Two Shillings.]

AN

ARGUMENT

IN THE CASE OF

JAMES SOMMERSETT

A NEGRO,

LATELY DETERMINED BY

THE COURT OF KING's BENCH:

Wherein it is attempted to demonſtrate

THE PRESENT UNLAWFULNESS

OF

DOMESTIC SLAVERY IN ENGLAND.

TO WHICH IS PREFIXED

A STATE OF THE CASE.

By Mr. HARGRAVE,

One of the COUNSEL for the NEGRO.

LONDON:

Printed for the AUTHOR:

And ſold by W. OTRIDGE, oppoſite the New Church, in the Strand.

M.DCC.LXXII.

turned for cauſe of detainer, that Sommerſett was the negro ſlave of Charles Steuart Eſquire, who had delivered Sommerſett into Mr. Knowles's cuſtody, in order to carry him to Jamaica, and there ſell him as a ſlave. Affidavits were alſo made by Mr. Steuart and two other gentlemen, to prove that Mr. Steuart had purchaſed Sommerſett as a ſlave in Virginia, and had afterwards brought him into England, where he left his maſter's ſervice; and that his refuſing to return, was the occaſion of his being carried on board Mr. Knowles's ſhip.

LORD MANSFIELD chuſing to refer the matter to the determination of the Court of King's Bench, Sommerſett with ſureties was bound in a recognizance for his appearance there on the 2d day of the next Hillary term; and his lordſhip allowed till that day for ſettling the form of the return to the *habeas corpus*. Accordingly on that day Sommerſett appeared in the Court of King's Bench, and then the following return was read,

"I JOHN KNOWLES, commander of the "veſſel called the Ann and Mary in the writ here- "unto annexed, do moſt humbly certify and return to "our preſent moſt Serene Sovereign the King; that at "the time herein after-mentioned of bringing the ſaid "James Sommerſett from Africa, and long before, "there were, and from thence hitherto there have been, "and ſtill are great numbers of negro ſlaves in Africa;

"and

" and that during all the time aforeſaid there hath
" been, and ſtill is a trade, carried on by his Majeſty's
" ſubjects, from Africa to his Majeſty's colonies or
" plantations of Virginia and Jamaica in America, and
" other colonies and plantations belonging to his Ma-
" jeſty in America, for the neceſſary ſupplying of the
" aforeſaid colonies and plantations with negro ſlaves;
" and that negro ſlaves, brought in the courſe of the ſaid
" trade from Africa to Virginia and Jamaica aforeſaid
" and the ſaid other colonies and plantations in America,
" by the laws of Virginia and Jamaica aforeſaid and the
" ſaid other colonies and plantations in America, dur-
" ing all the time aforeſaid, have been, and are ſale-
" able and ſold as goods and chattels, and upon the
" ſale thereof have become and been, and are the ſlaves
" and property of the purchaſers thereof, and have
" been, and are ſaleable and ſold by the proprietors
" thereof as goods and chattels. And I do further
" certify and return to our ſaid Lord the King, that
" James Sommerſett, in the ſaid writ hereunto an-
" nexed named, is a negro, and a native of Africa;
" and that the ſaid James Sommerſett, long before the
" coming of the ſaid writ to me, to wit on the 10th
" day of March in the year of our Lord 1749, was a
" negro ſlave in Africa aforeſaid, and afterwards, to
" wit on the ſame day and year laſt aforeſaid, being
" ſuch negro ſlave, was brought in the courſe of the
" ſaid trade as a negro ſlave from Africa aforeſaid to
" Virginia aforeſaid, to be there ſold; and afterwards,
" to wit on the 1ſt day of Auguſt in the year laſt afore-

" ſaid, the ſaid James Sommerſett, being and conti-
" nuing ſuch negro ſlave, was ſold in Virginia aforeſaid
" to one Charles Steuart Eſquire, who then was an in-
" habitant of Virginia aforeſaid; and that the ſaid
" James Sommerſett thereupon then and there became,
" and was the negro ſlave and property of the ſaid
" Charles Steuart, and hath not at any time ſince been
" manumitted, enfranchiſed, ſet free, or diſcharged;
" and that the ſaid James Sommerſett, ſo being the ne-
" gro ſlave and property of him the ſaid Charles
" Steuart, and the ſaid Charles Steuart having occa-
" ſion to tranſact certain affairs and buſineſs of him
" the ſaid Charles Steuart in this kingdom, he the
" ſaid Charles Steuart, before the coming of the ſaid
" writ to me, to wit on the firſt day of October in the
" year of our Lord 1769, departed from America afore-
" ſaid, on a voyage for this kingdom, for the purpoſe
" of tranſacting his aforeſaid affairs and buſineſs, and
" with an intention to return to America, as ſoon as
" the ſaid affairs and buſineſs of him the ſaid Charles
" Steuart in this kingdom ſhould be tranſacted, and
" afterwards, to wit on the 10th day of November in
" the ſame year, arrived in this kingdom, to wit in
" London, that is to ſay, in the pariſh of Saint Mary
" le Bow in the ward of Cheap; and that the ſaid
" Charles Steuart brought the ſaid James Sommerſett,
" his negro ſlave and property, along with him in the
" ſaid voyage, from America aforeſaid to this king-
" dom, as the negro ſlave and property of him the ſaid
" Charles Steuart, to attend and ſerve him, during his

ſtay

" ſtay and abiding in this kingdom, on the occaſion
" aforeſaid, and with an intent to carry the ſaid James
" Sommerſett, back again into America, with him the
" ſaid Charles Steuart, when the ſaid affairs and buſi-
" neſs of the ſaid Charles Steuart ſhould be tranſacted;
" which ſaid affairs and buſineſs of the ſaid Charles
" Steuart are not yet tranſacted, and the intention of
" the ſaid Charles Steuart to return to America as afore-
" ſaid hitherto hath continued, and ſtill continues.
" And I do further certify to our ſaid Lord the King,
" that the ſaid James Sommerſett did accordingly attend
" and ſerve the ſaid Charles Steuart in this kingdom,
" from the time of his ſaid arrival, until the ſaid James
" Sommerſett's departing and abſenting himſelf from
" the ſervice of the ſaid Charles Steuart herein after-
" mentioned, to wit at London aforeſaid in the pariſh
" and ward aforeſaid; and that before the coming of
" this writ to me, to wit on the 1ſt day of October in
" the year of our Lord 1771, at London aforeſaid, to
" wit in the pariſh and ward aforeſaid, the ſaid James
" Sommerſett, without the conſent, and againſt the
" will of the ſaid Charles Steuart, and without any
" lawful authority whatſoever, departed and abſented
" himſelf from the ſervice of the ſaid Charles Steuart,
" and abſolutely refuſed to return into the ſervice of
" the ſaid Charles Steuart, and ſerve the ſaid Charles
" Steuart, during his ſtay and abiding in this kingdom,
" on the occaſion aforeſaid: WHEREUPON the ſaid
" Charles Steuart, afterwards and before the coming
" of this writ to me, to wit on the 26th day of No-
vember

"ember in the year of our Lord 1771, on board the "ſaid veſſel called the Ann and Mary, then and ſtill "lying in the river Thames, to wit at London afore- "ſaid, in the pariſh and ward aforeſaid, and then and "ſtill bound upon a voyage for Jamaica aforeſaid, did "deliver the ſaid James Sommerſett unto me, who "then was, and yet is maſter and commander of the "ſaid veſſel, to be by me ſafely and ſecurely kept and "carried and conveyed, in the ſaid veſſel, in the ſaid "voyage to Jamaica aforeſaid, to be there ſold as the "ſlave and property of the ſaid Charles Steuart; and "that I did thereupon then and there, to wit at Lon- "don aforeſaid in the pariſh and ward aforeſaid, re- "ceive and take, and have ever ſince kept and detained "the ſaid James Sommerſett in my care and cuſtody, "to be carried by me in the ſaid voyage to Jamaica "aforeſaid, for the purpoſe aforeſaid. And this is "the cauſe of my taking and detaining the ſaid James "Sommerſett and whoſe body I have now ready, as by "the ſaid writ I am commanded."

After the reading of the return, Mr. Serjeant Davy, one of the counſel for Sommerſett the negro, deſired time to prepare his argument againſt the return; and on account of the importance of the caſe, the court poſtponed hearing the objections againſt the return, till the 7th of February, and the recognizance for the negro's appearance was continued accordingly. On that day Mr. Serjeant Davy and Mr. Serjeant Glynn argued againſt the return, and the further argument was poſtponed

poſtponed till Eaſter term, when Mr. Mansfield, Mr. Alleyne, and Mr. Hargrave, were alſo heard on the ſame ſide. Afterwards Mr. Wallace and Mr. Dunning argued in ſupport of the return, and Mr. Serjeant Davy was heard in reply to them. The determination of the court was ſuſpended till the following Trinity term; and then the court was unanimouſly of opinion againſt the return, and ordered that Sommerſett ſhould be diſcharged.

THE following argument, on the behalf of the negro, is not to be conſidered as a ſpeech actually delivered; for though the author of it, who was one of the counſel for the negro, did deliver one part of his argument in court without the aſſiſtance of notes; yet his argument, as here publiſhed, is entirely a written compoſition. This circumſtance is mentioned, leſt the author ſhould be thought to claim a merit, [illegible] has not the leaſt title.

ARGU-

ARGUMENT

FOR THE

NEGRO.

THOUGH the learning and abilities of the gentlemen with whom I am joined on this occaſion, have greatly anticipated the arguments prepared by me; yet I truſt, that the importance of the caſe will excuſe me for diſcloſing my ideas of it, according to the plan and order which I originally found it convenient to adopt.

Short ſtate of the Caſe.

THE caſe before the court, when expreſſed in few words, is this. Mr. Steuart purchaſes a negro ſlave in Virginia, where by the law of the place negroes are ſlaves, and ſaleable as other property. He comes into England, and brings the negro with him. Here the negro leaves Mr. Steuart's ſervice without his conſent; and afterwards perſons employed by him ſeize the negro, and forcibly carry him on board a ſhip bound to Jamaica, for the avowed purpoſe of tranſporting him to that iſland, and there ſelling him as a ſlave. On an application by the negro's friends, a writ of habeas corpus is granted; and in obe-

obedience to the writ he is produced before this court, and here ſues for the reſtitution of his liberty.

Importance of the caſe.

THESE queſtions, ariſing on this caſe, do not merely concern the unfortunate perſon, who is the ſubject of it, and ſuch as are or may be under like unhappy circumſtances. They are highly intereſting to the whole community, and cannot be decided, without having the moſt general and important conſequences; without extenſive influence on private happineſs and publick ſecurity. The right, claimed by Mr. Steuart to the detention of the negro, is founded on the condition of ſlavery, in which he was before his maſter brought him into England; and if that right is here recognized, domeſtick ſlavery, with it's horrid train of evils, may be lawfully imported into this country, at the diſcretion of every individual foreign and native. It will come not only from our own colonies, and thoſe of other European nations; but from Poland, Ruſſia, Spain, and Turky, from the coaſt of Barbary, from the Weſtern and Eaſtern coaſts of Africa; from every part of the world, where it ſtill continues to torment and diſhonour the human ſpecies. It will be tranſmitted to us in all it's various forms, in all the gradations of inventive cruelty; and by an univerſal reception of ſlavery, this country, ſo famous for publick liberty, will become the chief ſeat of private tyranny.

Points which ariſe in the caſe.

IN ſpeaking on this caſe, I ſhall arrange my obſervations under two heads. FIRST I ſhall conſider the

 right,

right, which Mr. Steuart claims in the perſon of the negro. SECONDLY I ſhall examine Mr. Steuart's authority to enforce that right, if he has any, by impriſonment of the negro and tranſporting him out of this kingdom. The court's opinion in favor of the negro, on either of theſe points, will entitle him to a diſcharge from the cuſtody of Mr. Steuart.

(1ſt) Point on the right claimed in the negro's perſon.

(1ſt.) THE firſt point, concerning Mr. Steuart's right in the perſon of the negro, is the great one, and that which, depending on a variety of conſiderations, requires the peculiar attention of the court. Whatever Mr. Steuart's right may be, it ſprings out of the condition of ſlavery, in which the negro was before his arrival in England, and wholly depends on the continuance of that relation; the power of impriſoning at pleaſure here, and of tranſporting into a foreign country for ſale as a ſlave, certainly not being exerciſeable over an ordinary ſervant. Accordingly the return fairly admits ſlavery to be the ſole foundation of Mr. Steuart's claim; and this brings the queſtion, as to the preſent lawfulneſs of ſlavery in England, directly before the court. It would have been more artful to have aſſerted Mr. Steuart's claim in terms leſs explicit, and to have ſtated the ſlavery of the negro before his coming into England, merely as a ground for claiming him here, in the relation of a ſervant bound to follow wherever his maſter ſhould require his ſervice. The caſe repreſented in this diſguiſed way, tho' in ſubſtance the ſame, would have been leſs alarming in it's

Slavery the foundation of the claim to the negro.

firſt

firſt appearance, and might have afforded a better chance of evading the true queſtion between the parties. But this artifice, however convenient Mr. Steuart's counſel may find it in argument, has not been adopted in the return; the caſe being there ſtated as it really is, without any ſuppreſſion of facts to conceal the great extent of Mr. Steuart's claim, or any colouring of language to hide the odious features of ſlavery in the feigned relation of an ordinary ſervant.

General obſervations on domeſtick ſlavery.

BEFORE I enter upon the enquiry into the preſent lawfulneſs of ſlavery in England, I think it neceſſary to make ſome general obſervations on ſlavery. I mean however always to keep in view ſlavery, not as it is in the relation of a ſubject to an abſolute prince, but only as it is in the relation of the loweſt ſpecies of ſervant to his maſter, in any ſtate whether free or otherwiſe in it's form of government. Great confuſion has enſued from diſcourſing on ſlavery, without due attention to the difference, between the deſpotiſm of a ſovereign over a whole people and that of one ſubject over another. The former is foreign to the preſent caſe, and therefore, when I am deſcribing ſlavery, or obſerving upon it, I deſire to be underſtood as confining myſelf to the latter; though from the connection between the two ſubjects, ſome of my obſervations may perhaps be applicable to both.

Difficulty of defining ſlavery.

SLAVERY has been attended in different countries with circumſtances ſo various, as to render it difficult

to give a general deſcription of it. The Roman lawyer (*a*) calls ſlavery *a conſtitution of the law of nations by which one is made ſubject to another contrary to nature*. But this, as has been often obſerved by the commentators, is miſtaking the law by which ſlavery is conſtituted for ſlavery itſelf, the cauſe for the effect; though it muſt be confeſſed, that the latter part of the definition obſcurely hints at the nature of ſlavery. Grotius (*b*) deſcribes ſlavery to be, *an obligation to ſerve another for life in conſideration of being ſupplied with the bare neceſſaries of life*. Dr. Rutherforth (*c*) rejects this definition, as implying a right to direct only the labors of the ſlave and not his other actions. He therefore, after defining *deſpotiſm* to be *an alienable right to direct all the actions of another*; from thence concludes, that *perfect ſlavery* is *an obligation to be ſo directed*. This laſt definition may ſerve to convey a general idea of ſlavery; but like that by Grotius and many other definitions which I have ſeen, if underſtood ſtrictly, will ſcarce ſuit any ſpecies of ſlavery, to which it is applied. Beſides it omits one of ſlavery's ſevereſt and moſt uſual incidents; the quality, by which it involves all the iſſue in the misfortune of the parent. In truth, as I have already hinted, the variety of forms, in which ſlavery appears, makes it almoſt impoſſible to convey a juſt notion of it in the way of de-

(*a*) Dig. lib. 1. tit. 5. lex 4. ſ. 1. *Servitus eſt conſtitutio juris gentium quâ quis dominio alieno contra naturam ſubjicitur.*

(*b*) Jur. Bell. lib. 2. c. 5. ſ. 27.

(*c*) Inſt. Nat. L. b. 1. c. 20. p. 474.

finition.

ſinition. There are however certain properties, which have accompanied ſlavery in moſt places; and by attending to theſe, we may always diſtinguiſh it, from the mild ſpecies of domeſtic ſervice ſo common and well known in our own country. I ſhall ſhortly enumerate the moſt remarkable of thoſe properties; particularly, ſuch as characterize the ſpecies of ſlavery adopted in our American colonies, being that now under the conſideration of this court. This I do, in order that a juſt conception may be formed, of the propriety with which I ſhall impute to ſlavery the moſt pernicious effects. Without ſuch a previous explanation, the moſt ſolid objections to the permiſſion of ſlavery will have the appearance of unmeaning, though ſpecious, declamation.

Properties uſually incident to ſlavery.

SLAVERY always imports an obligation of perpetual ſervice; an obligation, which only the conſent of the maſter can diſſolve.—It generally gives to the maſter, an arbitrary power of adminiſtring every ſort of correction, however inhuman, not immediately affecting the life or limb of the ſlave: ſometimes even theſe are left expoſed to the arbitrary will of the maſter, or they are protected by fines, and other ſlight puniſhments, too inconſiderable to reſtrain the maſter's inhumanity.—It creates an incapacity of acquiring, except for the maſter's benefit.—It allows the maſter to alienate the perſon of the ſlave in the ſame manner as other property.—Laſtly, it deſcends from parent to child, with all it's ſevere appendages.—On the moſt accurate

compariſon,

compariſon, there will be found nothing exaggerated in this repreſentation of ſlavery. The deſcription agrees with almoſt every kind of ſlavery, formerly or now exiſting; except only that remnant of the ancient ſlavery, which ſtill lingers in ſome parts of Europe, but qualified and moderated in favor of the ſlave by the humane proviſion of modern times.

Bad effects of ſlavery.

FROM this view of the condition of ſlavery, it will be eaſy to decide it's deſtructive conſequences.—It corrupts the morals of the maſter, by freeing him from thoſe reſtraints with reſpect to his ſlave, ſo neceſſary for the controul of the human paſſions, ſo beneficial in promoting the practice and confirming the habit of virtue.—It is dangerous to the maſter, becauſe his oppreſſion excites implacable reſentment and hatred in the ſlave, and the extreme miſery of his condition continually prompts him to riſque the gratification of them, and his ſituation daily furniſhes the opportunity.—To the ſlave it communicates all the afflictions of life, without leaving for him ſcarce any of its pleaſures; and it depreſſes the excellence of his nature, by denying the ordinary means and motives of improvement. —It is dangerous to the ſtate, by it's corruption of thoſe citizens on whom it's proſperity depends; and by admitting within it a multitude of perſons, who, being excluded from the common benefits of the conſtitution, are intereſted in ſcheming it's deſtruction.—Hence it is, that ſlavery, in whatever light we view it, may be deemed a moſt pernicious inſtitution: imme-

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diately ſo, to the unhappy perſon who ſuffers under it; finally ſo, to the maſter who triumphs in it, and to the ſtate which allows it.

Opinion of ſome modern writers in favour of the utility of ſlavery, but under many reſtrictions.

HOWEVER I muſt confeſs, that notwithſtanding the force of the reaſons againſt the allowance of domeſtic ſlavery, there are civilians of great credit, who inſiſt upon its utility; founding themſelves chiefly, on the ſuppoſed increaſe of robbers and beggars in conſequence of it's diſuſe. This opinion is favoured by Puffendorf (*d*) and Ulricus Huberus (*e*). In the diſſertation on ſlavery prefixed to Potgieſſerus on the German law *de ſtatu ſervorum*, the opinion is examined minutely and defended. To this opinion I oppoſe thoſe ill conſequences, which I have already repreſented as almoſt neceſſarily flowing from the permiſſion of domeſtic ſlavery; the numerous teſtimonies againſt it, which are to be found in antient and modern hiſtory; and the example of thoſe European nations, which have ſuppreſſed the uſe of it, after the experience of many centuries and in the more improved ſtate of ſociety. In juſtice alſo to the writers juſt mentioned I muſt add, that though they contend for the advantages of domeſtic ſlavery, they do not ſeem to approve of it, in the form and extent in which it has generally been received; but under limitations, which would certainly render it far more tolerable. Huberus in his *Œconomia Romana* (*f*), has a remarkable paſſage, in which, after recommend-

(*d*) Law of Nature and Nations, b. 6. c. 3. ſ. 10.

(*e*) Prælect. Jur. Civ. page 16.

(*f*) See page 48.

ing

ing a mild ſlavery, he cautiouſly diſtinguiſhes it, from that cruel ſpecies, the ſubject of commerce between Africa and America. His words are, *loquor de ſervitute, qualis apud civiliores populos in uſu fuit; nec enim exempla barbarorum, vel quæ nunc ab Africa in Americam fiunt hominum commercia, velim mihi quiſquam objiciat.*

Origin of ſlavery, and it's general lawfulneſs conſidered.

THE great origin of ſlavery is captivity in war, though ſometimes it has commenced by contract. It has been a queſtion much agitated, whether either of theſe foundations of ſlavery is conſiſtent with natural juſtice. It would be engaging in too large a field of enquiry, to attempt reaſoning on the *general lawfulneſs* of ſlavery. I truſt too, that the liberty, for which I am contending, doth not require ſuch a diſquiſition; and am impatient to reach that part of my argument, in which I hope to prove ſlavery reprobated by the law of England as an *inconvenient* thing. Here therefore I ſhall only refer to ſome of the moſt eminent writers, who have examined, how far ſlavery founded on captivity or contract is conformable to the law of nature, and ſhall juſt hint at the reaſons, which influence their ſeveral opinions. The antient writers ſuppoſe the right of killing an enemy vanquiſhed in a juſt war; and thence infer the right of enſlaving him. In this opinion, founded, as I preſume, on the idea of puniſhing the enemy for his injuſtice, they are followed by Albericus Gentilis (*g*), Grotius (*b*),

(*g*) Jur. Gent. exp. de ſervitute.
(*b*) Jur. Bell. l. 3. c. 7. ſ. 5.

Puffen-

Puffendorf (*i*), Bynkerſhoek (*j*), and many others. But in the Spirit of Laws (*k*) the right of killing is denied, except in caſe of abſolute neceſſity and for ſelf-preſervation. However, where a country is conquered, the author ſeems to admit the conqueror's right of enſlaving for a ſhort time, that is, till the conqueſt is effectually ſecured, Dr. Rutherforth (*l*), not ſatisfied with the right of killing a vanquiſhed enemy, infers the right of enſlaving him, from the conqueror's right to a reparation in damages for the expences of the war. I do not know, that this doctrine has been examined; but I muſt obſerve, that it ſeems only to warrant a temporary ſlavery, till reparation is obtained from the property or perſonal labor of the people conquered. The lawfulneſs of ſlavery by contract is aſſented to by Grotius and Puffendorf (*m*), who found themſelves on the maintenance of the ſlave, which is the conſideration moving from the maſter. But a very great writer of our own country, who is now living, controverts (*n*) the ſufficiency of ſuch a conſideration. Mr. Locke (*o*) has framed another kind of argument againſt ſlavery by contract; and the ſub-

(*i*) Law of Nature and Nations, b. 6, c. 3. ſ. 6.

(*j*) Queſt. Jur. Publ. l. 1. t. 3.

(*k*) B. 15. c. 2.

(*l*) See his Inſt. Nat. Law, vol. 2. p. 573. and vol. 1. p. 481.

(*m*) See Grot. Jur. Bell. l. 2. c. 5. ſ. 1, 2. & Puff. Law of Nature and Nations, b. 6. c. 3. ſ. 4.

(*n*) See Blackſt. Comment. 1ſt ed. vol. 1. p. 412.

(*o*) See Locke on Governm. 8vo edit. b. 2. c. 4. p. 213.

ſtance of it is, that a right of preſerving life is unalienable; that freedom from arbitrary power is eſſential to the exerciſe of that right; and therefore, that no man can by compact enſlave himſelf. Dr. Rutherforth (*p*) endeavors to anſwer Mr. Locke's objection by inſiſting on various limitations to the deſpotiſm of the maſter; particularly, that he has no right to diſpoſe of the ſlave's life at pleaſure. But the misfortune of this reaſoning is, that though the contract cannot juſtly convey an arbitrary power over the ſlave's life, yet it generally leaves him without a ſecurity againſt the exerciſe of that or any other power. I ſhall ſay nothing of ſlavery by birth; except that the ſlavery of the child *muſt* be unlawful, if that of the parent cannot be juſtified; and that when ſlavery is extended to the iſſue, as it uſually is, it *may* be unlawful as to them, even though it is not ſo as to their parents. In reſpect to ſlavery uſed for the puniſhment of crimes againſt civil ſociety, it is founded on the ſame neceſſity, as the right of inflicting other puniſhments; never extends to the offender's iſſue; and ſeldom is permitted to be domeſtic, the objects of it being generally employed in public works, as the galley-ſlaves are in France. Conſequently this kind of ſlavery is not liable to the principal objections, which occur againſt ſlavery in general (*q*). Upon

(*p*) See his Inſt. Nat. Law, vol. 1. p. 480.

(*q*) Some writers there are, who deduce the lawfulneſs of domeſtic ſlavery from the practice of it amongſt the Jews, and from ſome

on the whole of this controverſy concerning ſlavery, I think myſelf warranted in ſaying, that the juſtice and lawfulneſs of every ſpecies of it, *as it is generally conſtituted*, except the limited one founded on the commiſſion of crimes againſt civil ſociety, is at leaſt doubtful; that if lawful, ſuch circumſtances are neceſſary to make it ſo, as ſeldom concur, and therefore render a juſt commencement of it barely poſſible; and that the oppreſſive manner in which it has generally commenced, the cruel means neceſſary to enforce it's continuance, and the miſchiefs enſuing from the permiſſion of it, furniſh very ſtrong preſumptions againſt it's juſtice, and at all events evince the humanity and policy of thoſe ſtates, in which the uſe of it is no longer tolerated.

Univerſal of domeſti ſlavery amongſt t ancients.

BUT however reaſonable it may be to doubt the juſtice of domeſtic ſlavery, however convinced we may be of it's ill effects, it muſt be confeſſed, that the practice is ancient and has been almoſt univerſal. Its beginning may be dated from the remoteſt period, in which there are any traces of the hiſtory of mankind. It commenced in the barbarous ſtate of ſociety, and was retained, even when men were far advanced in civilization. The nations of antiquity moſt famous for

ſome paſſages in the Old Teſtament which are thought to countenance it. See Vinn. in Inſtit. Heinecc. ed. l. 1. t. 3. p. 31. There are others who attempt to juſtify ſlavery by the New Teſtament, becauſe it contains no direct precepts againſt it. See Tayl. Elem. Civ. L. 434.—I ſhall not attempt to examine either of theſe opinions.

countenancing the ſyſtem of domeſtic ſlavery were the Jews, the Greeks, the Romans, and the antient Germans (*r*); amongſt all of whom it prevailed, but in various degrees of ſeverity. By the antient Germans it was continued in the countries they over-run; and ſo was tranſmitted to the various kingdoms and ſtates, which aroſe in Europe out of the ruins of the Roman empire. At length however it fell into decline in moſt parts of Europe; and amongſt the various cauſes, which contributed to this alteration, none were probably more effectual, than experience of it's advantages, the difficulty of continuing it, and a perſuaſion that the cruelty and oppreſſion almoſt neceſſarily incident to it were irreconcileable with the pure morality of the Chriſtian diſpenſation. The hiſtory of it's decline in Europe has been traced by many eminent writers; particularly Bodin (*s*), Albericus Gentilis (*t*), Potgieſſerus (*u*), Dr. Robertſon (*w*), and Mr. Millar (*x*). It is ſufficient here to ſay, that this great change began in

Decline of ſlavery in Europe.

(*r*) It appears by Cæſar and Tacitus, that the antient Germans had a kind of ſlaves before they emigrated from their own country. See Cæſ. de bell. Gall. lib. 6. cap. 13. & Tac. de mor. German. cap. 24. & 25. et Potgieſſ. de ſtat. ſervor. ap. Germ. lib. 1. cap. 1.

(*s*) See his book De Republicâ, cap. 5. de imperio ſervili.

(*t*) Jur. Gent. cap. de ſervitute.

(*u*) Jur. Germ. de ſtatu ſervorum.

(*w*) Life of the Emperor Charles the 5th, vol. 1.

(*x*) Obſervations on the diſtinction of ranks in civil ſociety. See alſo Tayl. Elem. Civ. L. 434. to 439.

Spain

Spain according to Bodin about the end of the 8th century, and was become general before the middle of the 14th century. Bartolus, the moſt famed commentator on the Civil law in that period, repreſents ſlavery as in diſuſe; and the ſucceeding commentators hold much the ſame language. However, they muſt be underſtood with many reſtrictions and exceptions; and not to mean, that ſlavery was completely and univerſally aboliſhed in Europe. Some modern Civilians, not ſufficiently attending to this circumſtance, rather too haſtily reprehend their predeceſſors for repreſenting ſlavery as diſuſed in Europe. The truth is, that the ancient ſpecies of ſlavery by frequent emancipations became greatly diminiſhed in extent; the remnant of it was conſiderably abated in ſeverity; the diſuſe of the practice of enſlaving captives taken in the wars between Chriſtian powers aſſiſted in preventing the future increaſe of domeſtic ſlavery; and in ſome countries of Europe, particularly England, a ſtill more effectual method, which I ſhall explain hereafter, was thought of to perfect the ſuppreſſion of it. Such was the expiring ſtate of domeſtic ſlavery in Europe at the commencement of the 16th century, when the diſcovery of America and of the Weſtern and Eaſtern coaſts of Africa gave occaſion to the introduction of a new ſpecies of ſlavery. It took it's riſe from the Portugueſe, who, in order to ſupply the Spaniards with perſons able to ſuſtain the fatigue of cultivating their new poſſeſſions in America, particularly the Iſlands, opened a trade between Africa and America for the ſale of negro ſlaves. This diſgraceful commerce

Revival of domeſtic ſlavery in America.

commerce in the human ſpecies is ſaid to have begun in the year 1508, when the firſt importation of negro ſlaves was made into Hiſpaniola from the Portugueſe ſettlements on the Weſtern coaſt of Africa (y). In 1540 the emperor Charles the 5th endeavored to ſtop the progreſs of the negro ſlavery, by orders that all ſlaves in the American iſles ſhould be made free; and they were accordingly manumitted by Lagaſca the governor of the country on condition of continuing to labor for their maſters. But this attempt proved unſucceſsful, and on Lagaſca's return to Spain domeſtic ſlavery revived and flouriſhed as before (z). The expedient of having ſlaves for labor in America was not long peculiar to the Spaniards; being afterwards adopted by the other Europeans as they acquired poſſeſſions there. In conſequence of this general practice, negroes are become a very conſiderable article in the commerce between Africa and America; and domeſtic ſlavery has taken ſo deep a root in moſt of our own American colonies, as well as in thoſe of other nations, that there is little probability of ever ſeeing it generally ſuppreſſed.

The attempt to introduce the ſlavery of negroes into England examined.

HERE I conclude my obſervations on domeſtick ſlavery in general. I have exhibited a view of it's nature, of it's bad tendency, of it's origin, of the arguments for and againſt it's juſtice, of it's decline in Europe, and the introduction of a new ſlavery by the Eu-

(y) Ander. Hiſt. Comm. v. 1. p. 336.

(z) See Bodin de republic. lib. 1. c. 5.

ropeans

ropean nations into their American colonies. I ſhall now examine the attempt to obtrude this new ſlavery into England. And here it will be material to obſerve, that if on the declenſion of ſlavery in this and other countries of Europe where it is diſcountenanced, no means had been deviſed to obſtruct the admiſſion of a *new* ſlavery, it would have been vain and fruitleſs to have attempted ſuperſeding the *antient* ſpecies. But I hope to prove, that our anceſtors at leaſt were not ſo ſhort-ſighted; and that long and uninterrupted uſage has eſtabliſhed rules, as effectual to prevent the revival of ſlavery, as their humanity was ſucceſsful in once ſuppreſſing it. I ſhall endeavor to ſhew, that the law of England never recognized any ſpecies of domeſtic ſlavery, except the *antient* one of *villenage* now expired, and has ſufficiently provided againſt the introduction of a *new* ſlavery under the name of *villenage* (*a*) or any other denomination whatever. This propoſition I hope to demonſtrate from the following conſiderations.

Arguments to prove, that the law of England will not admit a new ſlavery.

I. I apprehend, that this will appear to be the law of England from the manner of making title to a villein.

1. Argument from the manner of making title to a villein.

THE only ſlavery our law-books take the leaſt notice of is that of a villein; by whom was meant, not the mere

(*a*) Villenage is uſed to expreſs ſometimes the *tenure* of lands held by villein-ſervices, and ſometimes the *perſonal bondage* of the villein; but throughout this argument it is applied in the latter ſenſe only.

tenant

tenant by villein ſervices, and *who might be free in his perſon*, but the villein in *blood* and tenure: and as the Engliſh law has no proviſions to regulate any other ſlavery, therefore no ſlavery can be lawful in England except ſuch as will conſiſtently fall under the denomination of villenage.

The condition of a villein.

THE condition of a villein had moſt of the incidents I have before deſcribed, in giving the idea of ſlavery in general. His ſervice was uncertain and indeterminate, ſuch as his lord thought fit to require; or as ſome of our ancient writers (*b*) expreſs it, *he knew not in the evening what he was to do in the morning, he was bound to do whatever he was commanded.* He was liable to beating, impriſonment, and every other chaſtiſement his lord could deviſe, except killing and maiming (*c*). He was incapable of acquiring property for his own benefit, the rule being *quicquid acquiritur ſervo acquiritur domino* (*d*). He was himſelf the ſubject of pro-

(*b*) See the extracts from them in Co. Litt. 116. b.

(*c*) See Termes de la Ley, ed. of 1567. voc. Villenage—Old Tenures, cap. Villenage—Fitzh. Abr. Coron. 17.—2. Ro. Abr. 1.—2. Inſt. 45.—& Co. Litt. 126. & 127.

(*d*) Co. Litt. 117. a.—The words, in pleading ſeizin of villein-ſervice, are very expreſſive of the lord's power over the villein's property. In 1. E. 2. 4. it is pleaded that the lord was ſeized of the villein and his anceſtors *come affaire rechat de char & de ſank & de fille marier & de eux tailler haut & bas &c.* The form in 5. E. 2. 15. is, *come de nos vileynes en feſant de luy notre provoſt en p̄nant de luy rechat de char & de ſaunk & redemption pur fill' & fitz marier de luy & de ces aunc & a tailler haut & bas a notre volente.* In the firſt of the

perty; as ſuch ſaleable and tranſmiſſible. If he was a villein regardant, he paſſed with the manor or land to which he was annexed, but might be ſevered at the pleaſure of his lord (*e*). If he was a villein in groſs, he was an hereditament or a chattel real according to his lord's intereſt; being deſcendible to the heir where the lord was abſolute owner, and tranſmiſſible to the executor where the lord had only a term of years in him (*f*). Laſtly, the ſlavery extended to the iſſue, if both parents were villeins, or if the father only was a villein; our law deriving the condition of the child from that of the father, contrary to the Roman law, in which the rule was *partus ſequitur ventrem* (*g*).

the above forms there is evidently a miſprint; and the reading ſhould be *a faire rechat* inſtead of *affaire rechat*. As to the word *provoſt* in the ſecond form, it ſeems to ſignify *plunder*, and perhaps the print ſhould be *proie* or *proye* inſtead of *provoſt*. I was led to this conjecture by the following proverb in Cotgrave's French Dictionary, *qui a le vilain il a ſa proye*. See Cotgr. ed. of 1673. voc. *proye*. However, in the Latin Entries the word *provoſt* is tranſlated *propoſitum*, which in a barbarous ſenſe of the word may be conſtrued to ſignify *will* or *pleaſure*, and will make the paſſage intelligible. In ſome Entries *provoſt* is tranſlated *præpoſitus*; but this word cannot be underſtood in any ſenſe that will make this uſe of it intelligible.

The forms of pleading ſeizin of villein-ſervices in the Latin Entries are very ſimilar to thoſe I have extracted from the year books. See Raſt. Entr. 401. a.

(*e*) Litt. ſect. 181.

(*f*) Bro. Abr. Villenage, 60.—Co. Litt. 117.

(*g*) Co. Litt. 123. Antiently our law ſeems to have been very uncertain in this reſpect. See Glanv. lib. 5. c. 6. Mirr. c. 2. ſ. 38. Britt.

The origin of villeins.

THE origin of villenage is *principally* (*b*) to be derived from the wars between our Britiſh Saxon Daniſh and Norman anceſtors, whilſt they were contending for the poſſeſſion of this country. Judge Fitzherbert in his reading on the 4th of Edw. I. ſtat. 1. intitled *Extenta manerii*, ſuppoſes villenage to have commenced at the Conqueſt, by the diſtribution then made of the forfeited lands and of the vanquiſhed inhabitants reſident upon them (*i*). But there were many bondmen in England before the Conqueſt, as appears by the Anglo-Saxon laws regulating them; and therefore it would be nearer the truth to attribute the origin of villeins, as well to the preceding wars and revolutions in this country, as to the effects of the Conqueſt (*k*).

Decline of villenage.

AFTER the Conqueſt many things happily concurred, firſt to check the progreſs of domeſtic ſlavery in England, and finally to ſuppreſs it. The cruel cuſ-

Britt. c. 31. But the writers in the reign of Henry the 6th, agree that our law was as here repreſented; and from the plea of baſtardy, which was held to be a peremptory anſwer to the allegation of villenage ſo early as the reign of Edward the 3d. I conjecture, that the law was ſettled in the time of his father. See Forteſc. laud. leg. Angl. c. 42. Litt. ſect. 187.—43. E. 3. 4. & Bro. Abr. Villenage, 7.

(*b*) I do not ſay *wholly*, becauſe probably there were ſome ſlaves in England before the firſt arrival of the Saxons; and alſo they and the Danes might bring ſome few from their own country.

(*i*) See the extract from Fitzherbert's reading in Barring. Obſerv. on Ant. Stat. 2d edit. p. 237.

(*k*) See Spelm. Gloſſ. voc. *Lazzi & Servus*. Somn. on Gavelk. 65. and the index to Wilk. Leg. Saxon. tit. *Servus*.

tom

tom of enſlaving captives in war being aboliſhed, from that time the acceſſion of a *new* race of villeins was prevented, and the humanity policy and neceſſity of the times were continually wearing out the *antient* race. Sometimes, no doubt, manumiſſions were freely granted; but they probably were much oftener extorted during the rage of the civil wars, ſo frequent before the reign of Henry the 7th about the forms of the conſtitution or the ſucceſſion to the crown. Another cauſe, which greatly contributed to the extinction of villenage, was the diſcouragement of it by the courts of juſtice. They always preſumed in favor of liberty, throwing the *onus probandi* upon the lord, as well in the writ of *homine replegiando*, where the villein was plaintiff, as in the *nativo habendo*, where he was defendant (*l*). Nonſuit

(*l*) See Lib. Intrat. 176. a. 177.*b. & Bro. Abr. Villenage, 66. It ſeems however, that if after a *nativo habendo* brought by the lord, the villein, inſtead of waiting for the lord's proceeding upon it, ſued out a *libertate probanda* to remove the queſtion of villenage for trial before the juſtices in eyre, on the return of it he was to produce ſome proof of his free condition; and that if he failed, he and his pledges were amerced. But this failure did not entitle the lord to any benefit from his *nativo habendo*, and therefore, if he proceeded in it, and could not prove the villenage, the judgment was for the villein; or if the lord did not proceed, a nonſuit, which was equally fatal to the lord's claim, was the neceſſary conſequence. See 47. H. 3. It. Dev. Fitz. Abr. Villenage, 39. In truth, the requiſition of proof from the villein on the *libertate probanda*, and the amercement for want of it, ſeem to have been mere form; for as Fitzherbert ſays in explaining the effect of the *libertate probanda*, "the "record ſhall be ſent before the juſtices in eyre, and the lord ſhall

 "declare

of the lord after appearance in a *nativo habendo*, which was the writ for aſſerting the title of ſlavery, was a bar.

" declare thereupon, and the villein ſhall make his defence and " plead thereunto, and the villein ſhall not declare upon the writ " *de libertate probanda*, nor ſhall any thing be done thereupon, for " that writ is but a *ſuperſedeas* to ſurceaſe for the time, and to adjourn " the record and the writ of *nativo habendo* before the juſtices in " eyre." Fitzh. Nat. Br. 77. D. Upon the whole therefore it may I think be ſafely aſſerted, that in all caſes of villenage the *onus probandi* lay upon the lord.

The ſeveral remedies againſt and for one claimed as a villein are now ſo little underſtood, that perhaps a ſhort account of them may be acceptable; more particularly as, by a right conception of them, it will be more eaſy to determine on the force of the argument drawn againſt the revival of ſlavery from the rules concerning villenage.

The lord's remedy for a fugitive villein was, either by ſeizure, or by ſuing out a writ of *nativo habendo*, or *neifty*, as it is ſometimes called.

1. If the lord ſeized, the villein's moſt effectual mode of recovering liberty was by the writ of *homine replegiando*; which had great advantage over the writ of *habeas corpus*. In the *habeas corpus* the return, as the law is generally underſtood to be, cannot be conteſted, though the party making a falſe one is liable to an action for damages, and perhaps may be puniſhable by the court for a contempt. Therefore if to a *habeas corpus* villenage was returned as the cauſe of detainer, the perſon for whom the writ was ſued could not have been reſtored to his liberty. But in the *homine replegiando* it was otherwiſe; for if villenage was returned, an *alias* iſſued directing the ſheriff to replevy the party on his giving ſecurity to anſwer the claim of villenage afterwards, and the plaintiff might declare for *falſe impriſonment* and lay *damages*, and on the defendant's pleading the villenage had the ſame opportunity of conteſting it, as when impleaded by the lord in a *nativo habendo*. See Fitzh. N. Br. 66. F & Lib. Intrat. 176. a. 177. b.

2. If

to another *nativo habendo*, and a perpetual enfranchiſement; but nonſuit of the villein after appearance in a *libertate probanda*, which was one of the writs for aſſerting the claim of liberty againſt the lord, was no bar to another writ of the like kind (*m*). If two plaintiffs joined in a *nativo habendo*, nonſuit of one was a nonſuit of both; but it was otherwiſe in a *libertate probanda* (*n*). The lord could not proſecute for more than two

2. If the lord ſued out a *nativo habendo*, and the villenage was denied, in which caſe the ſheriff could not ſeize the villein, the lord was then to enter his plaint in the county court; and as the ſheriff was not allowed to try the queſtion of villenage in his court, the lord could not have any benefit from the writ, without removing the cauſe by the writ of *pone* into the king's bench or common pleas. [For the count pleading and judgment in the *nativo habendo* after the removal, ſee Raſt. Entr. 436, 437.] It is to be obſerved, that the lord's right of ſeizure continued notwithſtanding his having ſued out a *nativo habendo*, unleſs the villein brought a *libertate probanda*. This writ, which did not lie except upon a *nativo habendo* previouſly ſued out, was for removal of the lord's plaint in the *nativo habendo* for trial before the juſtices in eyre or thoſe of the king's bench, and alſo for protecting the villein from ſeizure in the mean time. This latter effect ſeems to have been the chief reaſon for ſuing out the *libertate probanda*; and therefore after the 25th of Edw. 3. ſtat. 5. c. 18. which altered the common law, and gives a power of ſeizure to the lord, notwithſtanding the pendency of a *libertate probanda*, that writ probably fell much into diſuſe, though ſubſequent caſes, in which it was brought, are to be found in the year books. See Fitzh. Nat. 77. to 79. & 11 Hen. 4. 49.

(*m*) Co. Litt. 139.

(*n*) Co. Litt. 139.

two

villeins in one *nativo habendo*; but any number of villeins of the ſame blood might join in one *libertate probanda* (*o*). Manumiſſions were inferred from the ſlighteſt circumſtances of miſtake or negligence in the lord, from every act or omiſſion which legal refinement could ſtrain into an acknowledgement of the villein's liberty. If the lord veſted the ownerſhip of lands in the villein, received homage from him, or gave a bond to him, he was enfranchiſed. Suffering the villein to be on a jury, to enter into a religion and be profeſſed, or to ſtay a year and a day in antient demeſne without claim, were enfranchiſements. Bringing ordinary actions againſt him, joining with him in actions, anſwering to his actions without proteſtation of villenage, imparling in them or aſſenting to his imparlance, or ſuffering him to be vouched without counterpleading the voucher, were alſo enfranchiſements by implication of law (*p*). Moſt of the conſtructive manumiſſions I have mentioned were the received law, even in the reign of the firſt Edward (*q*). I have been the more particular in enumerating theſe inſtances of extraordinary favor to liberty, becauſe the anxiety of our anceſtors, to emancipate the *ancient* villeins, ſo well accounts for the eſtabliſhment of any rules of law, calculated to obſtruct the introduction of a *new ſtock*. It was natural, that the ſame opinions, which influenced to diſcountenance

(*o*) Fitzh. Nat. Br. 78. C. D.

(*p*) See Litt. ſect. 202 to 209. & 2. Ro. Abr. 735, 736, & 737.

(*q*) See Britt. cap. 31. & Mirr. cap. 2. ſect. 38.

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the former, ſhould lead to the prevention of the latter.

When villenage expired.

I ſhall not attempt to follow villenage in the ſeveral ſtages of it's decline; it being ſufficient here to mention the time of it's extinction, which, as all agree, happened about the latter end of Elizabeth's reign or ſoon after the acceſſion of James (*r*). One of the laſt inſtances, in which villenage was inſiſted upon, was Crouch's caſe reported in Dyer and other books (*s*) An entry having been made by one Butler on ſome lands purchaſed by Crouch, the queſtion was, whether he was Butler's villein regardant; and on two ſpecial verdicts, the one in ejectment Mich. 9th and 10th Eliz. and the other in aſſize Eaſter 11th Eliz. the claim of villenage was diſallowed, one of the reaſons given for the judgment in both being the want of ſeizin of the villein's perſon within 60 (*t*) years, which is the time limited by the 32d of Hen. 8. chap. 2. in all caſes of hereditaments claimed by preſcription (*u*). This is generally ſaid to have been the laſt caſe of villenage; but there are four ſubſequent

(*r*) See Sir Thomas Smith's Commonwealth, b. 2. c. 10. and Barringt. Obſerv. on Ant. Stat. 2d Ed. p. 232.

(*s*) See Dy. 266. pl. 11. & 283. pl. 32.

(*t*) Accord. Bro. Read. on the ſtat. of limitat. 32. Hen. 8. page 17.

(*u*) Before this ſtatute of Hen. the 8th. the time of limitation ſeems to have been the coronation of Hen. 3. as appears by the form of the *nativo habendo*; though in other writs of right the limitation by 31. E. 1. c. 39. was from the commencement of the reign of Richard the 1ſt.

caſes

eaſes in print. One was in Hillary 18th of Elizabeth (*w*); another was a judgment in Eaſter 1ſt of James (*x*); the third, which was never determined, happened in Trinity 8th of James (*y*); and the fourth was ſo late as Hillary 15th of James (*z*). From the 15th of James the firſt, being more than 150 years ago, the claim of villenage has not been heard of in our courts of juſtice; and nothing can be more notorious, than that the race of perſons, who were once the objects of it, was about that time completely worn out by the continual and united operation of deaths and manumiſſions.

BUT though villenage itſelf is obſolete, yet fortunately thoſe rules by which the claim of it was regulated, are not yet buried in oblivion. Theſe the induſtry of our anceſtors has tranſmitted; nor let us their poſterity deſpiſe the reverent legacy. By a ſtrange progreſs of human affairs, *the memory of ſlavery expired now furniſhes one of the chief obſtacles to the introduction of ſlavery attempted to be revived*; and the venerable reliques of the learning relative to villenage, ſo long conſigned to gratify the inveſtigating curioſity of the antiquary, or uſed as a ſplendid appendage to the ornaments of the ſcholar, muſt now be drawn forth from

(*w*) See Co. Entr. 4c6. b.

(*x*) Yelv. 2.

(*y*) This caſe is only to be found in Hughes' Abridgment, tit. Villenage, pl. 23.

(*z*) Noy 27.

their

their faithful repoſitories for a more noble purpoſe; to inform and guide the ſober judgment of this court, and as I truſt to preſerve this country from the miſeries of domeſtic ſlavery.

Manner of making tit to a villein explained.

LITTLETON (*a*) ſays, *every villein is either a villein by title of preſcription, to wit that he and his anceſtors have been villeins time out of memory, or he is a villein by his own confeſſion in a court of record.* And in another place (*b*) his deſcription of a villein regardant, and of a villein in groſs, ſhews that title cannot be made to either without preſcription or confeſſion. *Time whereof no memory runs to the contrary,* is an inſeparable incident to every preſcription (*c*); and therefore, according to Littleton's account of villenage, the lord muſt *prove* the ſlavery *antient* and *immemorial*; or the villein muſt ſolemnly *confeſs* it to be ſo in a court of juſtice. A ſtill earlier writer lays down the rule in terms equally ſtrong. *No one,* ſays Britton (*d*), *can be a villein except of antient nativity, or by acknowledgment.* All the proceedings in caſes of villenage when conteſted, conform to this idea of *remote antiquity* in the ſlavery, and are quite irreconcileable with one of *modern* commencement.

(*a*) Sect. 175.

(*b*) Sect. 181, 182, & 185.

(*c*) Litt. ſect. 170.

(*d*) *Nul ne poit eſtre villeyn forſque de aunciene nativite ou par recognizance.* Britt. Wing. ed. cap. 31. p. 78.

1. THE villein in all ſuch ſuits (*e*) between him and his lord was ſtiled *nativus* as well as *villanus*; our antient (*f*) writers deſcribe a female ſlave by no other name than that of *neif*; and the technical name of the only writ in the law for the recovery of a villein is equally remarkable, being always called the *nativo habendo*, or writ of *neifty*. This peculiarity of denomination, which implies that villenage is *a ſlavery by birth*, might perhaps of itſelf be deemed too ſlight a foundation for any ſolid argument; but when combined with other circumſtances more deciſive, ſurely it is not without very conſiderable force.

2. IN pleading villenage where it had not been confeſſed on ſome former occaſion, the lord always founded his title on *preſcription*. Our year-books, and books of entries, are full of the forms uſed in pleading a title to villeins regardant. In the *homine replegiando*, and other actions where the plea of villenage was for the purpoſe of ſhewing the plaintiff's diſability to ſue, if the villein was regardant, the defendant alledged, that he was ſeized of ſuch a manor, and that the plaintiff *and his anceſtors* had been villeins belonging to the manor *time out of mind*, and that the defendant and his anceſtors, and all thoſe whoſe eſtate he had in the manor,

(*e*) See the form of the writs of *nativo habendo* and *libertate probanda*, and alſo of the *alias homine replegiando*, where on the firſt writ the ſheriff returns the claim of villenage.

(*f*) Britt. cap. 31. & Litt. ſect. 186.

had

had been ſeized of the plaintiff and *all his anceſtors* as of villeins belonging to it (*g*). In the *nativo habendo* the form of making title to a villein regardant was in ſubſtance the ſame (*h*). In fact, regardancy neceſſarily implies preſcription, being where one and his anceſtors have been annexed to a manor *time out of the memory of man* (*i*). As to villeins in groſs, the caſes relative to them are very few; and I am inclined to think, that there never was any great number of them in England. The author of the *Mirroir* (*k*), who wrote in the reign of Edward the 2d, only mentions villeins regardant; and Sir Thomas Smith, who was ſecretary of ſtate in the reign of Edward the 6th, ſays, that in his time he never knew a villein in groſs throughout the realm (*l*). However, after a long ſearch I do find places in the year-books, where the form of alledging villenage in groſs is expreſſed, not in full terms, but in a general way; and in all the caſes I have yet ſeen, the villenage is alledged in the *anceſtors* of the perſon againſt whom it was pleaded (*m*), and in one of them the words *time*

 beyond

(*g*) See Raſt. Entr. tit. Homine Replegiando 373. & Lib. Intrat. 56.

(*h*) See the form in Lib. Intrat. 97. & Raſt. Entr. 401.

(*i*) This is agreeable to what Littleton ſays in ſect. 182.

(*k*) Mirr. c. 2. ſ. 38.

(*l*) Smith's Commonwealth, b. 2. c. 10.

(*m*) See 1. E. 2. 4.—5. E. 2. 15.—7. E. 2. 242. & 11. E. 2. 344. In 13. E. 4. 2. b. pl. 4. & 3. b. pl. 11. there is a caſe in which villenage in groſs is pleaded, where one became a villein in groſs by

beyond memory (*n*) are added. But if precedents had been wanting, the authority of Littleton, according to whom the title to villenage of each kind, unleſs it has been confeſſed, *muſt* be by preſcription, would not have left the leaſt room for ſuppoſing the pleading of a preſcription leſs neceſſary on the claim of villeins in groſs than of thoſe regardant.

3. THE kind of evidence, which the law required to prove villenage, and allowed in diſproof of it, is only applicable to a ſlavery in *blood* and *family*, one *uninterruptedly* tranſmitted through a long line of anceſtors to the perſon againſt whom it was alledged. On the lord's part, it was neceſſary that he ſhould prove the ſlavery againſt his villein by other villeins of the *ſame blood* (*o*), ſuch as were deſcended from the ſame common

ſeverance from the manor to which he had been regardant. This being the only caſe of the kind I have met with, I will ſtate ſo much of it from the year-book as is neceſſary to ſhew the manner of pleading. In treſpaſs the defendant pleads, that a manor, to which the plaintiff's father was a villein regardant, was given to an anceſtor of the defendant in tail, and that the manor deſcended to Cecil and Catherine; and that on partition between them, the villein with ſome lands was allotted to Cecil, and the manor to Catherine; and then the defendant conveyed the villein from Cecil to himſelf as heir.

(*n*) 11. E. 2. 344.

(*o*) See Bro. Abr. Villenage, 66. Reg. Br. 87. a. Old Nat. Br. 43. b. Fitzh. Abr. Villenage, 38, 39. A *baſtard* was not receivable to prove villenage, 13. E. 1. It. North. Fitzh. Abr. 36. & Britt. Wing. edit. 82. a.

male

male ſtock, and would acknowledge themſelves villeins to the lord (*p*), or thoſe from whom he derived his title; and at leaſt *two* witneſſes (*q*) of this deſcription were requiſite for the purpoſe. Nay, ſo ſtrict was the law in this reſpect, that in the *nativo habendo* the defendant was not obliged to plead to the claim of villenage, unleſs the lord at the time of declaring on his title brought his witneſſes with him into court, and they acknowledged themſelves villeins, and ſwore to their conſanguinity with the defendant (*r*); and if the plaintiff

(*p*) In Fitzherbert's Natura Brevium 79. B. it is ſaid, that the witneſſes muſt acknowledge themſelves villeins to the *plaintiff* in the *nativo habendo*; and there are many authorities which favor the opinion. See Glanv. lib. 5. c. 4. Britt. Wing. ed. 81. a. 19. Hen. 6. 32. b. Old Tenures, chap. Villenage; and the form in which the confeſſion of villenage by the plaintiff's witneſſes is recorded in Raſt. Entr. tit. *Nativo habendo*, 401. a. However, it muſt be confeſſed, that in Fitzherbert the opinion is delivered with a *quære*; and it is ſo irreconcileable with the lord's right of granting villeins, as it is ſtated by Littleton, ſect. 181. that I will not inſiſt upon it here.

(*q*) Fitzh. Nat. Br. 78. H. & Fitzh. Abr. Villenage, 36 & 37.— Alſo Britton ſays, *un maſle ſauns pluſurs neſt mie receivable*. Britt. Wingate's ed. p. 82. It is remarkable that *females*, whether ſole or married, were not receivable to prove villenage againſt men. *Saunk de un home ne puit ne doit eſtre trie par femmes*. Britt. Wing. ed. p. 82. The reaſon aſſigned is more antient than polite. It is ſaid to be *pur lour fraylte*, and alſo becauſe a man *eſt pluis digne perſon que une feme*. 13. E. 1. Fitzh. Abr. Villenage, 37.

(*r*) Fitzh. Nat. Br. 78. H. Fitz. Abr. Villenage, 32. Lib. Intrat. 97. Raſt. Entr. 401. Reg. Br. 87.

failed

failed in adducing ſuch previous evidence, the judgment of the court was, that the defendant ſhould be *free for ever*, and the plaintiff was amerced for his falſe claim (*s*). In other actions the production of *ſuit* or witneſſes by the plaintiff, previous to the defendant's pleading, fell into diſuſe ſometime in the reign of Edward the third; and ever ſince, the entry of ſuch production on the rolls of the court has been mere form, being always with an *&c.* and without naming the witneſſes. But in the *nativo habendo* the actual production of the *ſuit*, and alſo the examination of them, unleſs the defendant releaſed (*t*) it in court, continued to be indiſpenſable even down to the time when villenage (*u*) expired. Such was the ſort of teſtimony, by which only the lord could ſupport the title of ſlavery; nor were the means of defence on the part of the villein leſs remarkable. If he could prove that the ſlavery was not in his *blood* and *family*, he intitled himſelf to liberty. The author of the *Mirroir* (*w*) expreſly ſays, that *proof of a free ſtock* was an effectual defence againſt

(*s*) In Fitzh. Abr. Villenage, 38. there is an inſtance of ſuch a judgment, merely for the plaintiff's failure in the production of his witneſſes at the time of declaring on his title.

(*t*) See 19. H. 6. 32. b. a caſe in which the defendant releaſes the examination of the *ſuit*.

(*u*) The laſt entry in print of the proceedings in a *nativo habendo* contains the names of the *ſecta* or *ſuit* produced, and their acknowledgment of villenage on oath. See the caſe of *Jerney* againſt *Finch*, Hill. 18. Eliz. C. B. Co. Entr. 406. b.

(*w*) Mirr. c. 2. ſ. 28.

the

the claim of villenage; and even in the time of Henry the ſecond the law of England was in this reſpect the ſame, as appears by the words of *Glanville*. In his chapter on the trial (*x*) of liberty, he ſays that the perſon claiming it ſhall produce *plures de proximis et conſanguineis de eodem ſtipite unde ipſe exierat exeuntes; per quorum libertates, ſi fuerint in curia recognitæ et probatæ, liberabitur à jugo ſervitutis qui ad libertatem proclamatur.* But the ſpecial defences which the law permitted againſt villenage are ſtill more obſervable; and prove it beyond a contradiction to be, what the author of the *Mirroir* emphatically ſtiles it (*y*), a ſlavery *of ſo great an antiquity that no free ſtock can be found by human remembrance.* Whenever the lord ſued to recover a villein by a *nativo habendo*, or alledged villenage in other actions as a diſability to ſue, the perſon claimed as a villein might either plead *generally* that he was of free condition, and on the trial of this general iſſue avail himſelf of every kind of defence which the law permits againſt villenage; or he might plead *ſpecially* any ſingle fact or thing, which if true was of itſelf a legal bar to the claim of villenage, and in that caſe the lord was compellable to anſwer the ſpecial matter. Of this ſpecial kind were the pleas of *baſtardy* and *adventif*. The former was an allegation by the ſuppoſed villein that either himſelf or his father, grand-

(*x*) Glanv. lib. 5. cap. 4.

(*y*) *Eſt ſubjection iſſuant de cy grand antiquite que nul franke ceppe purra eſtre trove per humane remembrance.* Mirr. c. 2. ſ. 28.

father

father or other *male* anceſtor, was born out of matrimony; and this plea, however remote the anceſtor in whom the baſtardy was alledged, was *peremptory* to the lord, that is, if true it deſtroyed the claim of villenage, and therefore the lord could only ſupport his title by denying the fact of baſtardy. This appears to have been the law from a great variety of the moſt antient authorities. The firſt of them is a determined caſe ſo early as the 13th of Edward the ſecond (*z*), and in all the ſubſequent caſes (*a*) the doctrine is received for law without once being drawn into queſtion. In one of them (*b*) the reaſon why baſtardy is a good plea in a bar againſt villenage is expreſſed in a very peculiar manner; for the words of the book are, *when one claims any man as his villein, it ſhall be intended always that he is his villein by reaſon of ſtock, and this is the reaſon that there ſhall be an anſwer to the ſpecial matter where he alledges baſtardy; becauſe if his anceſtor was a baſtard, he can never be a villein, unleſs by ſubſequent acknowledgment in a court of record.* The force of this reaſon will appear fully on recollection, that the law of England

(*z*) 13. E. 2. 408.

(*a*) Hill. 19. E. 2. Fitzh. Abr. Villenage, 32.—39. E. 3. 36.—43. E. 3. 4.—19. Hen. 6. 11. & 12.—19. Hen. 6. 17.—Old Tenures, cap. Villenage.—Co. Litt. 123. a. In the caſe 19. H. 6. 17. there is ſomething on the trial of baſtardy in caſes of villenage, explaining when it ſhall be tried by the biſhop's certificate and when by a jury. See on the ſame ſubject Fitzh. Abr. Villenage, 32. & Lib. Intrat. 35. a. which latter book contains the record of a caſe where the trial was by the biſhop.

(*b*) 43. E. 3. 4.

always derives the condition of the iſſue from that of the father, and that the father of a baſtard being in law uncertain (*c*), it was therefore impoſſible to prove a baſtard a ſlave by *deſcent*. In reſpect to the plea of *adventif*, there is ſome little confuſion in the explanation, our year-books give us, of the perſons to whom the deſcription of *adventif* is applicable; but the form of the plea will beſt ſhew the preciſe meaning of it. It alledged (*d*), that either the perſon himſelf who was claimed as a villein regardant to a manor, or one of his anceſtors, was born in a county different from that in which the manor was, and *ſo was free*, which was held to be a neceſſary concluſion to the plea. This in general was the form of the plea, but ſometimes it was more particular as in the following caſe (*e*). In treſpaſs, the defendant pleads that the plaintiff is his villein regardant to his manor of Dale; the plaintiff replies, that his great-grandfather was born in C, in the county of N, and from thence went into the county of S, and took lands held in bondage within the manor to which the plaintiff is ſuppoſed to be a villein regardant, and *ſo after time of memory his great-grandfather was adventif*. It is plain from this caſe, that the plea of *adventif* was calculated to deſtroy the claim to vil-

(*c*) Co. Litt. 123. a.

(*d*) 13. E. 1. It. North. Fitzh. Abr. Villenage 36. 19. E. 2. Fitz. Abr. Villenage 32. 33. E. 3. Fitzh. Abr. Viſne 2.—39. E. 3. 36.—41. E. 3. Fitzh. Abr. Villenage 7.—43. E. 3. 31.—50. E. 3. Fitz. Abr. Villenage 24.—19. H. 6. 11.—19. H. 6. 17.

(*e*) 31. E. 3. Fitzh. Abr. Viſne 1.

lenage regardant, by ſhewing that the connection of the ſuppoſed villein and his anceſtors with the manor to which they were ſuppoſed to be regardant, had begun within time of memory; and as holding lands by villein-ſervices was antiently deemed a mark (*f*), though not a certain one, of *perſonal bondage*, I conjecture that this ſpecial matter was never pleaded, except to diſtinguiſh the *mere tenant by villein ſervices* from the villein in *blood* as well as *tenure*. But whatever might be the caſes proper for the plea of *adventif*, it is one other incontrovertible proof, in addition to the proofs already mentioned, that no ſlavery having had commencement *within time of memory* was lawful in England; and that if one anceſtor could be found whoſe blood was unpolluted with the ſtain of ſlavery, the title of villenage was no longer capable of being ſuſtained.

How it is that the rules of law concerning villenage exclude a *new* ſlavery.

SUCH were the ſtriking peculiarities in the manner of making title to a villein, and of conteſting the queſtion of liberty; and it is ſcarce poſſible to attend to the enumeration of them, without anticipating me in the inferences I have to make.—The law of England only knows ſlavery by *birth*; it requires *preſcription* in making title to a ſlave; it receives on the lord's part *no* teſtimony except ſuch as proves the ſlavery to

(*f*) Fitzherbert ſays, *if a man dwelli on lands which have been held in villenage time out of mind, he ſhall be a villein, and it is a good preſcription; and againſt this preſcription it is a good plea to ſay that his father or grandfather was adventif, &c.* Fitz. Abr. Villenage 24.

have

have been *always in* the *blood* and *family*, on the villein's part *every* teſtimony which proves the ſlavery to have been *once out of* his *blood* and *family*; it allows *nothing* to ſuſtain the ſlavery except what ſhews its commencement *beyond* the time of memory; every thing to defeat the ſlavery which evinces its commencement *within* the time of memory. But in our American colonies and other countries ſlavery may be by *captivity* or *contract* as well as *by birth*; no *preſcription* is requiſite; nor is it neceſſary that ſlavery ſhould be in the *blood* and *family*; and *immemorial*. Therefore the law of England is not applicable to the ſlavery of our American colonies, or of other countries.—If the law of England would permit the introduction of a ſlavery commencing out of England; the rules it preſcribes for trying the title to a ſlave would be applicable to ſuch a ſlavery; but they are not ſo; and from thence it is evident that the introduction of ſuch a ſlavery is not permitted by the law of England.—The law of England then excludes *every ſlavery not commencing in England, every ſlavery though commencing there not being antient and immemorial*. Villenage is the only ſlavery which can poſſibly anſwer to ſuch a deſcription, and That has been long expired by the deaths and emancipations of all thoſe who were once the objects of it. Conſequently there is now no ſlavery, which can be lawful in England, until the Legiſlature ſhall interpoſe its authority to make it ſo.

THIS is plain, unadorned, and direct reaſoning; it wants no aid from the colours of art, or the embelliſhments of language; it is compoſed of neceſſary inferences from facts and rules of law, which do not admit of contradiction; and I think, that it muſt be vain to attempt ſhaking a ſuperſtructure raiſed on ſuch ſolid foundations.

As to the other arguments I have to adduce againſt the revival of domeſtic ſlavery, I do confeſs that they are leſs powerful, being merely preſumptive. But then I muſt add, that they are ſtrong and violent preſumptions; ſuch as furniſh more certain grounds of judicial deciſion, than are to be had in many of the caſes which become the ſubjects of legal controverſy. For

1ſt. Argument againſt a *new* ſlavery from the fact of there never having been any ſlavery but villenage, and from the extinction of that ſlavery.

1ſtly, I INFER that the law of England will not permit a *new* ſlavery, from the fact of there never yet having been any ſlavery but villenage, and from the actual extinction of that *ancient* ſlavery. If a *new* ſlavery could have lawfully commenced here, or lawfully have been introduced from a foreign country, is there the moſt remote probability, that in the courſe of ſo many centuries a *new* ſlavery ſhould never have ariſen? If a *new* race of ſlaves could have been introduced under the denomination of villeins, if a *new* ſlavery could have been from time to time engrafted on the *ancient* ſtock, would the laws of villenage have *once* become

become obſolete for want of objects, or would not a ſucceſſive ſupply of ſlaves have continued their operation to the preſent times? But notwithſtanding the vaſt extent of our commercial connections, the fact is confeſſedly otherwiſe. The *antient* ſlavery has once expired; neither natives nor foreigners have yet ſucceeded in the introduction of a *new* ſlavery; and from thence the ſtrongeſt preſumption ariſes, that the law of England doth not permit ſuch an introduction.

3dly, I INSIST, that the unlawfulneſs of introducing a *new* ſlavery into England, from our American colonies or any other country, is deducible from the rules of the Engliſh law concerning contracts of ſervice. The law of England will not permit any man to *enſlave* himſelf by contract. The utmoſt, which our law allows, is a contract to ſerve for life; and ſome perhaps may even doubt the validity of ſuch a contract, there being no determined caſes directly affirming it's lawfulneſs. In the reign of Henry the fourth (*g*), there is a caſe of debt brought by a ſervant againſt the maſter's executors, on a retainer to ſerve for term of life in peace and war for one hundred ſhillings a year; but it was held, that debt did not lie for want of a ſpecialty; which, as was agreed, would not have been neceſſary in the caſe of a common laborer's ſalary, becauſe, as the

3d. Argument againſt a *new* ſlavery from the rules of law againſt ſlavery by contract.

(*g*) 2. H. 4. 14.

caſe

caſe is explained by Brooke in abridging it, the latter is bound to ſerve by ſtatute. (*b*). This caſe is the only one I can find, in which a contract to ſerve for life is mentioned; and even in this caſe, there is no judicial deciſion on the force of it. Nor did the nature of the caſe require any opinion upon ſuch a contract; the action not being to eſtabliſh the contract againſt the ſervant, but to enforce payment againſt the maſter's executors for arrears of ſalary in reſpect of ſervice actually performed; and therefore this caſe will ſcarce bear any inference in favor of a contract to ſerve for life. Certain alſo it is, that a ſervice for life in England is not uſual, except in the caſe of a military perſon; whoſe ſervice, though in effect for life, is rather ſo by the operation of the yearly acts for regulating the army, and of the perpetual act for governing the navy, than in conſequence of any expreſs agreement. However, I do not mean abſolutely to deny the lawfulneſs of agreeing to ſerve for life; nor will the inferences I ſhall draw from the rules of law concerning ſervitude by contract, be in the leaſt affected by admitting ſuch agreements to be lawful. The law of England may perhaps give effect to a contract of ſervice for life; but that is the *ne plus ultra* of ſervitude by contract in England. It will not allow the ſervant to inveſt the maſter with an arbitrary power of correcting impriſoning (*i*) or alienating him; it will not permit

(*b*) Bro. Abr. Dett. 55.

(*i*) Lord Hobart ſays, *the body of a freeman cannot be made ſubject*

to

him to renounce the capacity of acquiring and enjoying property, or to tranſmit a contract of ſervice to his iſſue (*k*). In other words, it will not permit the ſervant to incorporate into his contract the ingredients of ſlavery. And why is it that the law of England rejects a contract of ſlavery? The only reaſon to be aſſigned is, that the law of England, acknowledging only the *antient* ſlavery which is now expired, will not allow the introduction of a *new* ſpecies, even though founded on conſent of the party. The ſame reaſon operates with double force againſt a *new* ſlavery founded on captivity in war, and introduced from another country. Will the law of England condemn a *new* ſlavery commencing by *conſent* of the party, and at the ſame time approve of one founded on *force*, and moſt probably on *oppreſſion* alſo? Will the law of England invalidate a *new* ſlavery commencing in his country, when the title to the ſlavery may be fairly examined; and at the ſame time give effect to a *new* ſlavery introduced from another country, when diſproof of the ſlavery muſt generally be impoſſible?

to diſtreſs or impriſonment by contract, but only by judgment. Hob. 61.— I ſhall have occaſion to make uſe of this authority again in a ſubſequent part of this argument.

(*k*) Mr. Molloy thinks, that ſervants may contract to ſerve for life; but then he adds, *but at this day there is no contract of the anceſtor can oblige his poſterity to an hereditary ſervice; nor can ſuch as accept thoſe ſervants exerciſe the ancient right or dominion over them, no not ſo much as to uſe an extraordinary rigour, without ſubjecting themſelves to the law.* Moll. de jur. marit. 1ſt. ed. b. 3. c. 1. ſ. 7. p. 388.

This

This would be rejecting and receiving a *new* ſlavery at the ſame moment; rejecting ſlavery the *leaſt* odious, receiving ſlavery the *moſt* odious: and by ſuch an inconſiſtency, the wiſdom and juſtice of the Engliſh law would be compleatly diſhonoured. Nor will this reaſoning be weakened by obſerving that our law permitted villenage, which was a ſlavery confeſſed to originate from force and captivity in war; becauſe that was a ſlavery coeval with the firſt formation of the Engliſh conſtitution, and conſequently had a commencement here prior to the eſtabliſhment of thoſe rules which the common law furniſhes againſt ſlavery by contract.

Examination of the caſes on the ſubject of ſlavery ſince or juſt before the extinction of villenage.

HAVING thus explained the three great arguments which I oppoſe to the introduction of domeſtick ſlavery from our American colonies, or any foreign country, it is now proper to enquire how far the ſubject is affected by the caſes and judicial deciſions ſince or juſt before the extinction of villenage.

THE firſt caſe on the ſubject is one mentioned in Mr. Ruſhworth's *Hiſtorical Collections* (*l*); and it is there ſaid, that *in the eleventh of Elizabeth, one Cartwright brought a ſlave from Ruſſia, and would ſcourge him; for which he was queſtioned; and it was reſolved, that England was too pure an air for a ſlave to breathe in.* In order to judge what degree of credit is due to the

(*l*) Ruſhw. v. 2. p. 468.

repre-

repreſentation of this caſe, it will be proper to ſtate from whom Mr. Ruſhworth reports it. In 1637, there was a proceeding by information in the Star-Chamber againſt the famous John Lilburne, for printing and publiſhing a libel; and for his contempt in refuſing to anſwer interrogatories, he was by order of the court impriſoned till he ſhould anſwer, and alſo whipped, pilloried, and fined. His impriſonment continued till 1640, when the Long Parliament began. He was then releaſed, and the Houſe of Commons impeached the judges of the Star-chamber for their proceedings againſt Lilburne. In ſpeaking to this impeachment, the managers of the Commons cited the caſe of the Ruſſian ſlave. Therefore the truth of the caſe doth not depend upon John Lilburne's aſſertion, as the learned Obſerver on the Antient Statutes (*m*) ſeems to apprehend; but reſts upon the credit due to the managers of the Commons. When this is conſidered, and that the year of the reign in which the caſe happened is mentioned, with the name of the perſon who brought the ſlave into England; that not above 72 or 73 years had intervened between the fact and the relation of it; and alſo that the caſe could not be ſuppoſed to have any influence on the fate of the impeachment againſt the judges; I ſee no great objection to a belief of the caſe. If the account of it is true, the plain inference from it is, that the ſlave was become free by his arrival in England. Any other conſtruction renders the caſe unintelligible, becauſe ſcourging,

(*m*) Barr. Obſerv. on Ant. Stat. 2d edit. p. 241.

or even correction of a severer kind, was allowed by the law of England to the lord in the punishment of his villein; and consequently, if our law had recognized the Russian slave, his master would have been justified in scourging him.

The first case in our printed Reports is that of *Butts* against *Penny* (*n*), which is said to have been adjudged by the court of King's Bench in Trinity term 29th of Charles the second. It was an action of *trover* for 10 (*o*) negroes; and there was a special verdict, finding, that the negroes were infidels, subjects to an infidel prince, and usually bought and sold in *India* as merchandize by the custom amongst merchants, and that the plaintiff had bought them, and was in possession of them; and that the defendant took them out of his possession. The court held, that negroes *being usually bought and sold amongst merchants in India, and being infidels* (*p*), there

(*n*) 2 Lev. 201. & 3. Keb. 785. See Hil. 29. Cha. II. B. R. rot. 1116.

(*o*) According to Levinz, the action was for 100 negroes; but it is a mistake, the record only mentioning 10.

(*p*) According to this reasoning, it is lawful to have an infidel slave, but not a Christian one. This distinction, between persons of opposite persuasions in religion, is very antient. Amongst the Jews, the condition of the Hebrew slave had many advantages over that of a slave of foreign extraction. (See sect. 37. of the Dissertation on slavery prefixed to Potgiesser. Jur. Germ. de Stat. Serv.) Formerly too the Mahometans pretended, that their religion did not allow them to enslave such as should embrace it; but, as Bodin says,

might

might be a property in them ſufficient to maintain the action; and it is ſaid that judgment *niſi* was given for the plaintiff, but that on the prayer of the counſel for the defendant to be further heard in the caſe, time was given till the next term. In this way our Reporters ſtate the caſe; and if nothing further appeared, it might be cited as an authority, though a very feeble one, to ſhew that the maſter's property in his negro ſlaves continues after their arrival in England, and conſequently that the negroes are not emancipated by being brought here. But having a ſuſpicion of ſome defect in the ſtate of the caſe, I deſired an examination of the *roll* (*q*); and according to the account of it given to me, though the declaration is for negroes *generally* in London, without any mention of *foreign* parts, yet from the ſpecial verdict it appears, that the action was really brought to recover the value of negroes, of which the plaintiff had been poſſeſſed, not in *England*, but in *India*. Therefore this caſe would prove nothing

the opinion was little attended to in practice. (See Bodin. de Republica, lib. 1, cap. 5, de imperio ſervili.) A like diſtinction was made in very early times amongſt Chriſtians; and the author of the Mirroir in one place expreſſes himſelf, as if the diſtinction had been adopted by the law of England. (See the Mirr. c. 2, ſ. 28.) But our other antient writers do not take the leaſt notice of ſuch a diſtinction; nor do I find it once mentioned in the year-books, which are therefore ſtrong preſumptive evidence againſt the reception of it in our courts of juſtice as *law*, however the opinion may have prevailed amongſt divines and others in *ſpeculation*. See Barr. Obſerv. Ant. Stat. 2d edit. p. 239.

(*q*) The roll was examined for me by a friend.

in favour of ſlavery in *England*, even if it had received the court's judgment, which it never did, there being only an *ulterius conſilium* on the roll.

THE next caſe of *trover* was between *Gelly* and *Cleve* in the Common Pleas, and was adjudged in Michaelmas term 5th of William and Mary. In the Report of this caſe (*r*), the court is ſaid to have held, that trover will lie for a negro boy, becauſe *negroes are heathens*; and therefore a man may have property in them, and the court without averment will take notice that they are heathens. On examination of the *roll* (*s*), I find that the action was brought for various articles of merchandize as well as the negro; and I ſuſpect, that in this caſe, as well as the former one, of *Butts* and *Penny*, the action was for a negro in *America*; but the declaration being laid *generally*, and there being no ſpecial verdict, it is now too late to aſcertain the fact. I will therefore ſuppoſe the action to have been for a negro in England, and admit that it tends to ſhew the lawfulneſs of having negro ſlaves in England. But then if the caſe is to be underſtood in this ſenſe, I ſay that the caſe appears to have been adjudged without ſolemn argument; that there is no reaſoning in the report of this caſe to impeach the principles of law, on which I have argued

(*r*) 1. L. Raym. 147.

(*s*) See Trin. 5 W. & M. C. B. Roll. n°. 407.

againſt

againſt the revival of ſlavery in England; that unleſs thoſe principles can be controverted with ſucceſs, it will be impoſſible to ſuſtain the authority of ſuch a caſe; and further, that it ſtands contradicted by a ſubſequent caſe, in which the queſtion of ſlavery came *directly* before the court.

THE only other reported caſe of *trover* is that of *Smith* againſt *Gould*, which was adjudged Mich. 4 Ann in the King's Bench. In *trover* (*t*) for ſeveral things, and among the reſt for a negro, *not guilty* was pleaded, and there was a verdict for the plaintiff with *ſeveral* damages, 30l. being given for the negro; and after argument on a motion in arreſt of judgment, the court held, that *trover* did not lie for a negro. If in this caſe the action was for a negro in *England*, the judgment in it is a direct contradiction to the caſe of *Gelly* and *Clove*. But I am inclined to think, that in this, as well as in the former caſes of *trover*, the negroes for which the actions were brought, were *not* in *England*; and that in all of them the queſtion was *not* on the lawfulneſs of having negro ſlaves in *England*, but merely whether *trover* was the proper kind of action for recovering the value of a negro unlawfully detained from the owner in *America* and *India*. The things for which *trover* in general lies, are thoſe in which the owner has an *abſolute* property, without limitation on the uſe of them; whereas the maſter's power over the ſlave doth not

(*t*) Salk. 666.—See alſo, 1. L. Raym. 143.

extend

extend to his life, and consequently the master's property in the slave is in some degree *qualified* and *limited*. I am willing to suppose, that the cases of *trover* were determined on this distinction, and therefore I will not insist upon any benefit from them in argument; though the last of them, if it will bear any material inference, is certainly an authority against slavery in England.

THE next case I shall state is a judgment by the King's Bench in Hillary 8th and 9th of William the 3d. *Trespass vi et armis* was brought by *Chamberlain* (*u*) against *Harvey*, for taking a negro of the value of 100l. and by the special verdict it appears, that the negro for which the plaintiff sued, had been brought from Barbadoes into England, and was here baptized without the plaintiff's consent; and at the time when the trespass was alledged, was in the defendant's service, and had 6l. a year for wages. In the argument of this case, three questions were made. One was, whether the facts in the verdict sufficiently shewed that the plaintiff had ever had a vested property in the negro (*x*): another was, whether that property was not devested by bringing the negro into England: and the third was, whether *trespass* for taking a man of the value of 100l. was the proper action. After several arguments, the

(*u*) 1 L. Raym. 146. Carth. 396. et 5 Mod. 186.

(*x*) The facts, which occasioned this question, I have omitted in the state of the case; because they are not material to the question of slavery in England.

court

court gave judgment againſt the plaintiff. But I do confeſs, that in the Reports we have of the caſe, no opinion on the great queſtion of ſlavery is mentioned; it becoming unneceſſary to declare one, as the court held, that the action ſhould have been an action to recover damages for the *loſs* of the *ſervice*, and not to recover the *value* of the *ſlave*. Of this caſe, therefore, I ſhall not attempt to avail myſelf.

But the next caſe, which was an action of *indebitatus aſſumpſit* in the King's Bench by *Smith* againſt *Browne* and *Cooper* (*x*), is more to the purpoſe. The plaintiff declared for 20 l. for a negro ſold by him to the defendants in *London*; and on motion in arreſt of judgment, the court held, that the plaintiff ſhould have averred in the declaration, that *the negro at the time of the ſale was in Virginia, and that negroes by the laws and ſtatutes of Virginia are ſaleable* (*y*). In theſe words there is a *direct* opinion againſt the ſlavery of negroes in England: for if it was lawful, the negro would have been ſaleable and transferrable here, as well as in *Virginia*; and ſtating that the negro at the time

(*x*) 1. Salk. 666. The caſe is not reported in any other book; and in Salkeld the time when the caſe was determined is omitted. But it appears to have been in the King's Bench, by the mention of Lord Ch. J. Holt and Mr. J. Powell.

(*y*) The Reporter adds, that the court directed, that the plaintiff ſhould *amend* his declaration. But after verdict it cannot ſurely be the practice to permit ſo *eſſential* an amendment; and therefore the Reporter muſt have miſunderſtood the court's direction.

of

of the ſale was in *Virginia*, could not have been eſſential to the ſufficiency of the *declaration*. But the influence of this caſe on the queſtion of ſlavery, is not by mere inference from the court's opinion on the plaintiff's mode of declaring in his action. The language of the judges, in giving that opinion, is remarkably ſtrong againſt the ſlavery of negroes, and every other *new* ſlavery attempted to be introduced into England. Mr. Juſtice Powell ſays, *In a villein the owner has a property; the villein is an inheritance; but the law takes no notice of a negro.* Lord Chief Juſtice Holt is ſtill more explicit; for he ſays, that *one may be a villein in England*; but that *as ſoon as a negro comes into England, he becomes free.* The words of theſe two great judges contain the whole of the propoſition, for which I am contending. They admit property in the *villein*; they deny property in the *negro*. They aſſent to the *old* ſlavery of the villein; they diſallow the *new* ſlavery of the negro.

I BEG leave to mention one other caſe, chiefly for the ſake of introducing a ſtrong expreſſion of the late Lord Chancellor *Northington*. It is the caſe of *Shanley* and *Harvey*, which was determined in Chancery ſome time in March 1762. The queſtion was between a negro and his former maſter, who claimed the benefit of a *donatio mortis cauſâ* made to the negro by a lady, on whom he had attended as ſervant for ſeveral years by the permiſſion of his maſter. Lord Northington, as I am informed by a friend

friend who was preſent at the hearing of the cauſe, diſallowed the maſter's claim with great warmth, and gave coſts to the negro. He particularly ſaid, *As ſoon as a man puts foot on Engliſh ground, he is free: a negro may maintain an action againſt his maſter for ill uſage, and may have a habeas corpus, if reſtrained of his liberty* (z).

Having obſerved upon all the caſes, in which there is any thing to be found relative to the preſent lawfulneſs of ſlavery in England; it is time to conſider the force of the ſeveral objections, which are likely to be made, as well to the inferences I have drawn from the determined caſes, as to the general doctrine I have been urging.

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(z) In the above enumeration of caſes, I have omitted one, which was *Sir Thomas Grantham*'s caſe in the Common-Pleas, Hillary 2 & 3. Jam. 2. Being ſhort, I ſhall give it in the words of the Report. *He bought a monſter in the Indies, which was a man of that country, who had the ſhape of a child growing out of his breaſt as an excreſcency all but his head. This man he brought hither, and expoſed to the ſight of the people for profit. The Indian turns Chriſtian and was baptized, and was detained from his maſter, who brought a* homine replegiando. *The ſheriff returned, that he had replevied the body; but doth not ſay the body in which Sir Thomas claimed a property; whereupon he was ordered to amend his return, and then the court of Common Pleas bailed him.* 3 Mod. 120.—It doth not appear, that the return was ever argued, or that the court gave any opinion on this caſe; and therefore nothing can be inferred from it.

I 1. It

1. It may be aſked, Why it is that the law ſhould permit the *ancient* ſlavery of the *villein*, and yet diſallow a ſlavery of *modern* commencement?

To this I anſwer, that *villenage* ſprung up amongſt our anceſtors in the early and barbarous ſtate of ſociety; that afterwards more humane cuſtoms and wiſer opinions prevailed, and by their influence rules were eſtabliſhed for checking the progreſs of ſlavery; and that it was thought moſt prudent to effect this great object, not *inſtantaneouſly* by declaring every ſlavery unlawful, but *gradually* by excluding a *new* race of ſlaves, and encouraging the voluntary emancipation of the *ancient* race. It would have ſeemed an *arbitrary* exertion of power, by a retroſpective law to have annihilated property, which, however *inconvenient*, was *already* veſted by lawful means; but it was policy without injuſtice to reſtrain *future* acquiſitions of it.

2. It may be ſaid, that as there is nothing to hinder perſons of free condition from becoming ſlaves by *acknowledging* themſelves to be villeins, therefore a *new* ſlavery is not contrary to law.

The force of this objection ariſes from a ſuppoſition, that *confeſſion* or *acknowledgment* of villenage is a legal mode of *creating* ſlavery; but on examining the nature of the *acknowledgment*, it will be evident, that the law doth

doth not permit villenage to be acknowledged for any *ſuch* purpoſe. The term itſelf imports ſomething widely *different* from *creation*; the *acknowledgment*, or *confeſſion* of a thing, implying that the thing acknowledged or confeſſed has a *previous* exiſtence; and in all caſes, criminal as well as civil, the law *intends*, that no man will confeſs an untruth to his own diſadvantage, and therefore never requires proof of that which is admitted to be true by the perſon intereſted to deny it. Beſides, it is not allowable to inſtitute a proceeding for the *avowed* and *direct* purpoſe of acknowledging villenage; for the law will not allow the confeſſion of it to be received, except where villenage is alledged in an *adverſe* way; that is, only(*a*) when villenage was pleaded by the lord *againſt* one whom he claimed as his villein; or by the villein *againſt* ſtrangers, in order to excuſe himſelf from defending actions to which his lord only was the proper party; or when *one* villein was produced to prove villenage againſt *another* of the *ſame blood* who *denied* the ſlavery. If the *acknowledgment* had been permitted as a *creation* of ſlavery, would the law have required that the confeſſion ſhould be made in a mode ſo *indirect* and *circuitous* as a ſuit profeſſedly commenced for a *different* purpoſe? If confeſſion is a *creation* of ſlavery, it certainly muſt be deemed a *creation* by conſent; but if confeſſion had been adopted as a *voluntary* creation of ſlavery, would the law have reſtrained the courts of juſtice from receiving confeſſion, except in an *adverſe* way? If confeſſion had been al-

(*a*) Co. Litt. 122. b.

lowed as a *mode* of *creating* ſlavery, would the law have received the confeſſion of *one* perſon as good evidence of ſlavery in *another* of the *ſame blood*, merely becauſe they were deſcended from the ſame *common anceſtor*? This *laſt* circumſtance is of itſelf deciſive, becauſe it *neceſſarily* implied, that a ſlavery confeſſed was a ſlavery by *deſcent*.

On a conſideration of theſe circumſtances attending the acknowledgment of villenage, I think it impoſſible to doubt its being merely a *confeſſion* of that *antiquity* in the ſlavery, which was otherwiſe neceſſary to be *proved*. But if a doubt can be entertained, the opinions of the greateſt lawyers may be produced to remove it, and to ſhew that, in conſideration of law, the perſon *confeſſing* was a villein by *deſcent* and in *blood*. In the year-book of 43. E. 3 (*b*), it is laid down as a general rule, *that when one claims any man as his villein, it ſhall be intended always that he is his villein by reaſon of ſtock*. Lord Chief Juſtice *Hobart* conſiders villenage by confeſſion in this way, and ſays (*c*), *the confeſſion in the court of record is not ſo much a creation, as it is in ſuppoſal of law a declaration of rightful villenage before, as a confeſſion in other actions*. Mr. Serjeant *Rolle* too, in his Abridgment, when he is writing on villenage by acknowledgment, uſes very ſtrong words to the ſame effect. He ſays in one place (*d*), *it ſeems intended that title is*

(*b*) 43. E. 3. 4.

(*c*) Hob. 99.

(*d*) 2. Ro. Abr. 732. pl. 6.

it

to make that he ſhould be a villein by deſcent; and in another place (*e*), *it ſeems intended that title is made by preſcription, wherefore the iſſue ſhould alſo be villeins.* The only inſtance I can find of a *nativo habendo*, founded on a previous acknowledgment of villenage, is a ſtrong authority to the ſame purpoſe. In the 19th of Edward 2. (*f*) the dean and chapter of London brought a writ of *neifty* to recover a villein, and concluded their declaration with mentioning his acknowledgment of the villenage on a former occaſion, inſtead of producing their *ſuit*, or witneſſes, as was neceſſary when the villenage had not been confeſſed: but notwithſtanding the acknowledgment, the plaintiffs alledged a *ſeizin* of the villein with *eſplees*, or receipt of profits from him, in the uſual manner. This caſe is another proof, that a *ſeizin previous to the acknowledgment* was the real foundation of the lord's claim, and that the acknowledgment was merely uſed to *eſtop* the villein from conteſting a fact which had been before ſolemnly confeſſed. However, I do admit, that under the *form* of acknowledgment there was a *poſſibility* of *colluſively* creating ſlavery; but this was not practicable without the concurrence of the perſon himſelf who was to be the ſufferer by the fraud; and it was not probable that *many* perſons ſhould be found ſo baſe in mind, ſo falſe to themſelves, as to ſell themſelves and their poſterity, and to renounce the common protection and benefit of the law for a *bare* mainte-

(*e*) 2. Ro. Abr. 732. pl. 8.

(*f*) Fitzh. Abr. Villenage 34.

nance,

nance, which, by the wiſe proviſion of the law in this country, may always be had by the moſt needy and diſtreſſed, on terms infinitely leſs ignoble and ſevere. It ſhould alſo be remembered, that ſuch a colluſion could ſcarce be *wholly* prevented, ſo long as any of the *real* and *unmanumitted deſcendants* from the *antient* villeins remained; becauſe there would have been the ſame poſſibility of defrauding the law on the actual *trial* of villenage, as by a *previous acknowledgment*. Beſides, if colluſions of this ſort had ever become frequent, the Legiſlature might have prevented their effect by an *extraordinary* remedy. It ſeems, that antiently ſuch frauds were ſometimes practiſed; and that free perſons, in order to evade the trial of actions brought againſt them, alledged that they were villeins to a ſtranger to the ſuit, which, on account of the great improbability that a confeſſion ſo diſadvantageous ſhould be void of truth, was a plea the common law did not ſuffer the plaintiff to deny. But a remedy was ſoon applied, and the ſtatute of (g) 37. E. 3. was made, giving to the plaintiff a liberty of conteſting ſuch an allegation of villenage. If in theſe times it ſhould be endeavoured to revive domeſtic ſlavery in England, by a like *fraudulent confeſſion* of villenage, ſurely ſo unworthy an attempt, ſo groſs an evaſion of the law, would excite in this court the ſtrongeſt diſapprobation and reſentment, and from parliament would receive an *immediate* and effectual remedy; I mean, a law *declaring* that villenage, as is moſt *notoriouſly* the

(g) 37. E. 3. c. 16.

fact,

fact, has been *long* expired for want of *real* objects; and therefore making void all precedent confeſſions of it, and *prohibiting* the courts of juſtice from recording a *confeſſion* of villenage *in future*.

3. It may be objected, that though it is not uſual in the wars between Chriſtian powers to enſlave priſoners, yet that ſome nations, particularly the ſeveral ſtates on the coaſt of Barbary, ſtill adhere to that inhuman practice; and that in caſe of our being at war with them, the law of nations would juſtify our king in retaliating; and conſequently, that the law of England has not excluded the *poſſibility* of introducing a *new* ſlavery, as the arguments againſt it ſuppoſe.

But this objection may be eaſily anſwered; for if the arguments againſt a *new* ſlavery in England are well founded, they reach the *king* as well as his *ſubjects*: If it has been at all times the policy of the law of England not to recognize any ſlavery but the *antient* one of the villein, which is now expired; we cannot conſiſtently attribute to the *executive* power a prerogative of rendering that policy ineffectual. It is true, that the law of *nations* may give a right of retaliating on an enemy, who enſlaves his captives in war; but then the exerciſe of this right may be prevented or limited by the law of any *particular country*. A writer of eminence (*b*) on the law of *nations*, has a paſſage very applicable to

(*b*) Rutherf. Inſt. Nat. L. v. 2. p. 576.

this

this ſubject. His words are, *If the civil law of any nation does not allow of ſlavery, priſoners of war who are taken by that nation cannot be made ſlaves.* He is juſtified in his obſervation not only by the *reaſon* of the thing, but by the *practice* of ſome nations, where ſlavery is as unlawful as it is in England. The Dutch (*i*) when at war with the Algerines, Tuniſians, or Tripolitans, make no ſcruple of retaliating on their enemies; but ſlavery not being lawful in their European dominions, they have uſually ſold their priſoners of war as ſlaves in Spain, where ſlavery is ſtill permitted. To this example I have only to add, that I do not know an inſtance, in which a prerogative of having *captive ſlaves in England* has ever been aſſumed by the crown; and it being alſo the policy of our law not to admit a *new* ſlavery, there appears neither reaſon nor fact to ſuppoſe the exiſtence of a royal prerogative to introduce it.

(*i*) *Quia ipſa ſervitus inter Chriſtianos ferè exoleviſt, eâ quoque non utimur in hoſtes captos. Poſſumus tamen, ſi ita placeat, imo utimur quandoque adverſus eos, qui in nos utuntur. Quare et Belgæ quos Algerienſes, Tunicenſes, Tripolenſes in Oceano aut Mari Mediterraneo capiunt, ſolent in ſervitutem Hiſpaniâ vendere, nam ipſi Belgæ ſervos non habent, niſi Aſiâ Africâ et Americâ. Quo anno* 1661, *Ordines Generales Admiralio ſuo mandârunt, piratas captos in ſervitutem venderet. Idemque obſervatum eſt anno* 1664. Bynkerſhoek Quæſt. Jur. Publ. lib. 1. cap. 3.

4. ANOTHER

4. ANOTHER objection will be, that there are Engliſh acts of parliament, which give a ſanction to the ſlavery of negroes; and therefore that it is *now* lawful, whatever it might be *antecedently* to thoſe ſtatutes.

THE ſtatutes in favour of this objection are the 5 Geo. 2. c. 7. (*k*), which makes negroes in *America* liable to all debts, ſimple-contract as well as ſpecialty, and the ſtatutes regulating the African trade, particularly the 32. Geo. 2. c. 31. which in the preamble recites, that the trade to Africa is advantageous to Great Britain, and neceſſary for ſupplying it's *colonies* with negroes. But the *utmoſt* which can be ſaid of theſe ſtatutes, is, that they *impliedly* authorize the ſlavery of negroes in *America*; and it would be a ſtrange thing to ſay, that permitting ſlavery *there*, includes a permiſſion of ſlavery *here*. By an unhappy concurrence of circumſtances, the ſlavery of negroes is thought to have become neceſſary in *America*; and therefore in *America* our Legiſlature has permitted the ſlavery of negroes. But the ſlavery of negroes is unneceſſary in *England*, and therefore the Legiſlature has not extended the permiſſion of it to *England*; and not having done ſo, how can this court be warranted to make ſuch an extenſion?

5. THE ſlavery of negroes being admitted to be lawful *now* in America, however queſtionable it's *firſt*

(*k*) 5 G. 2. c. 7. ſ. 4.

introduction there might be, it may be urged, that the *lex loci* ought to prevail, and that the maſter's property in the negro as a ſlave having had a lawful commencement in *America*, cannot be juſtly varied by bringing him into *England*.

I SHALL anſwer this objection by explaining the limitation, under which the *lex loci* ought always to be received. It is a general rule (*l*), that the *lex loci* ſhall not prevail, if *great inconveniencies* will enſue from giving effect to it. Now I apprehend, that no inſtance can be mentioned, in which an application of the *lex loci* would be *more inconvenient*, than in the caſe of ſlavery. It muſt be agreed, that *where* the *lex loci* cannot have effect without introducing the thing prohibited in a degree either as great, or nearly as great, as if there was no prohibition, *there* the *greateſt inconvenience* would enſue from regarding the *lex loci*, and conſequently it ought not to prevail. Indeed, by receiving it in a caſe ſo circumſtanced, the end of a prohibition would be fruſtrated, either entirely or in a very great degree; and ſo the prohibition of things the moſt pernicious in their tendency, would become vain and fruitleſs. And what *greater inconveniencies* can we imagine, than thoſe, which would neceſſarily reſult from ſuch an unlimited ſacrifice of the *municipal* law to the law of a *foreign*

(*l*) See the chapter *de conflictu legum diverſarum in diverſis imperiis*, in Huber. Prælect. p. 538.

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country? I will now apply this *general* doctrine to the *particular* caſe of our own law concerning ſlavery. Our law prohibits the *commencement* of domeſtic ſlavery in *England*, becauſe it diſapproves of ſlavery, and conſiders it's operation as dangerous and deſtructive to the whole community. But would not this prohibition be *wholly* ineffectual, if ſlavery could be *introduced* from a *foreign* country? In the courſe of time, though perhaps in a progreſs leſs rapid, would not domeſtic ſlavery become as general, and be as compleatly revived in *England* by *introduction* from our *colonies* and from *foreign countries*, as if it was permitted to revive by *commencement here*? and would not the ſame inconveniencies follow? To prevent the revival of domeſtic ſlavery *effectually*, it's introduction muſt be reſiſted *univerſally*, without regard to the place of it's commencement; and therefore in the inſtance of ſlavery, the *lex loci* muſt yield to the *municipal* law. From the fact of there never yet having been any ſlavery in this country except the *old* and *now expired* one of *villenage*, it is evident, that hitherto *our law* has *uniformly* controlled the *lex loci* in this reſpect; and ſo long as the *ſame policy* of excluding ſlavery is retained by the law of England, it *muſt* continue intitled to the *ſame preference*. Nor let it be thought a peculiar want of complaiſance in the law of England, that, diſregarding the *lex loci* in the caſe of ſlaves, it gives immediate and entire liberty to them, when they are brought here from another country. Moſt of the

other European ſtates, in which ſlavery is diſcountenanced, have adopted a like policy.

In *Scotland* domeſtic ſlavery is (*m*) unknown, except ſo far as regards the (*n*) coal-hewers and ſalt-makers, whoſe condition, it muſt be confeſſed, bears ſome reſemblance to ſlavery; becauſe all who have once acted in either of theſe capacities, are compellable to ſerve, and fixed to their reſpective places of employment during life. But with this ſingle exception, there is not the leaſt veſtige of ſlavery; and ſo jealous is the Scotch law of every thing tending to ſlavery, that it has been held to diſallow contracts of ſervice for life, or for a very long term; as, for ſixty years (*o*). However, no particular caſe has yet happened, in which it has been neceſſary to decide, whether a ſlave of another country acquires freedom on his arrival in Scotland. In 1757 this queſtion was depending in the court of ſeſſion in the caſe of a negro; but

(*m*) See Crag. Jus Feud. lib. 1. dieges. 11. ſ. 32.—Stair's Inſtit. b. 1. t. 2. ſ. 11, 12.

(*n*) Forb. Inſtit. Part 1. b. 2. t. 3.—Macdoual Inſtit. vol. 1. p. 68.

(*o*) Macdoual. Inſtit. vol. 1. p. 68. But I muſt obſerve, that in the caſe relied on by Mr. Macdouall, the *term* of ſervice was not the *only* material circumſtance. The contract was between the maſters and the crews of ſome fiſh-boats; the latter binding themſelves for a yearly allowance to ſerve in their reſpective boats during three times nineteen years, *ſo that not one of them, during all that time, could remove from a particular village, or ſo much as from one boat to another.* See Dict. Deciſ. tit. *Pactum illicitum.*

the

the negro happening to die during the pendency of the cauſe, the queſtion was not * determined. But when it is conſidered, that in the time of Sir Thomas Craig, who wrote at leaſt 150 years ago, ſlavery was even then a thing unheard of in Scotland, and that there are no laws (*p*) to regulate ſlavery, one can ſcarce doubt what opinion the lords of ſeſſion would have pronounced, if the negro's death had not prevented a deciſion.

In the *United Provinces* ſlavery having fallen into diſuſe (*q*), all their writers agree, that ſlaves from another country become free the moment they enter into the Dutch territories (*r*). The ſame cuſtom prevails

* Wall. Inſtit. Law of Scotl. chap. on Maſter and Servant.

(*p*) Sir Thomas Craig, mentioning the Engliſh villenage, ſays,—*nullus eſt apud nos ejus uſus, et inauditum nomen, niſi quod nonnulla in libro* Regiæ Majeſtatis *de nativis et ad libertatem proclamantibus proponantur; quæ et ab Anglorum moribus ſunt recepta, et nunquam in uſum noſtrum deducta.* Crag. Jus Feud. lib. 1. dieg. 11. ſ. 32.

(*q*) *Belgæ ſervos non habent, niſi in Aſiâ, Africâ et Americâ.* Bynkerſh. Quæſt. Jur. Publ. lib. 1. c. 3.

Another great Dutch lawyer adds, *Nec cuiquam mortalium nunc liceat ſeſe venundare, aut aliâ ratione ſervitutis jure ſemel alteri addicere.* Voet Commentar. ad Pandect. lib. 1. tit. 5. ſ. 3.

(*r*) *Servitus paulatim ab uſu receſſit, ejuſque nomen hodie apud nos exolevit; adeo quidem ut ſervi, qui aliunde huc adducuntur, ſimul ac imperii noſtri fines intrârunt, invitis ipſorum dominis ad libertatem proclamare poſſint: id quod et aliorum Chriſtianorum gentium moribus receptum eſt.* Grœnewegen de Leg. Abrogat. in Hollandiâ, &c. p. 5.

John Voet, in the place cited in the preceding note, expreſſes himſelf to the ſame effect.

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in ſome of the neighbouring countries, particularly *Brabant*, and other parts of the *Auſtrian Netherlands*; and Gudelinus, an eminent civilian, who was formerly profeſſor of law at Louvain in Brabant, relates from the annals of the ſupreme counſel at Mechlin, that in the year 1531, an application for apprehending and ſurrendering a fugitive ſlave from Spain, was on this account rejected (*s*).

In France the law is particularly explicit againſt regarding the *lex loci* in the caſe of domeſtic ſlavery; and though, in ſome of the provinces, a remnant of the antient ſlavery is ſtill to be ſeen in the perſons of the *ſerfs*, or *gens de main-morte*, who are attached to particular lands (*t*), as villeins regardant formerly were in England; yet all the writers on the law of France agree, that the moment a ſlave arrives there from another country he acquires liberty, not in conſequence of any written law, but merely by long uſage having the force of law. There are many remarkable inſtances in which this rule againſt the admiſſion of ſlaves from foreign countries has had effect in France. Two are mentioned by (*u*) Bodin; one being the caſe of a foreign merchant who

(*s*) Gudelin. de Jur. Noviſſ. lib. 1. c. 5. et Vinn. in Inſtit. lib. 1. tit. 3. p. 32. edit. Heinecc.

(*t*) See Inſtit. au Droit Franc. par M. Argou, ed. 1753. lib. 1. chap. 1. p. 4.

(*u*) Bodin. de Republic. lib. 1. cap. 5. de imperio herili. See ſeveral other inſtances mentioned in the Negro cauſe, in the 13th volume of the *Cauſes Celebres*.

had

had purchaſed a ſlave in Spain, and afterwards carried him into France; the other being the caſe of a Spaniſh ambaſſador, whoſe ſlave was declared free, notwithſtanding the high and independent character of the ſlave's owner. This latter caſe has been objected to by ſome writers (*w*) on the *law of nations*, who do not diſapprove of the *general* principle on which liberty is given to ſlaves brought from foreign countries, but only complain of it's application to the *particular* caſe of an embaſſador. But, on the other hand, Wicquefort (*x*) blames the States of Holland for not following the example of the French, in a caſe which he mentions. After the eſtabliſhment of the French colonies in South America, the kings of France thought fit to deviate from the ſtrictneſs of the antient French law, in reſpect to ſlavery, and in them to permit and regulate the poſſeſſion of negro ſlaves. The firſt edict for this purpoſe is ſaid to have been one in April 1615, and another was made in May 1685 (*y*) which is not confined to negroes, but regulates the general police of the French iſlands in America, and is known by the name of the *Code noir*. But notwithſtanding theſe edicts, if

(*w*) Kirchner. de Legat. lib. 2. c. 1. num. 233.—and after him Bynkerſhoek Juge Compet. des Ambaſſad. ed. par Barbeyr. c. 15. §. 3.

(*x*) Wicquefort's Embaſſador, Engl. ed. p. 268.

(*y*) Deciſions Nouvelles, par M. Deniſart, tit. Negres.—Deniſart mentions, that the edict of 1685 is regiſtered with the ſovereign counſel at Domingo, but has never been regiſtered in any of the French parliaments.

negro

negro ſlaves were carried from the French American iſlands into France, they were intitled to the benefit of the antient French law, and became free on their arrival in France (z). To prevent this conſequence, a third edict was made in October 1716, which permits the bringing of negro ſlaves into France from their American iſlands. The permiſſion is granted under various reſtrictions; all tending to prevent the long continuance of negroes in France, to reſtrain their owners from treating them as property whilſt they continue in their mother country, and to prevent the importation of fugitive negroes; and with a like view, a royal declaration was made in Dec. 1738 (a); containing an expoſition of the edict of 1716, and ſome additional proviſions. But the antient law of France in favour of ſlaves from another country, ſtill has effect, if the terms of the edict of 1716, and of the declaration of 1738, are not ſtrictly complied with; or if the negro is brought from a place, to which they do not extend. This appears from two caſes adjudged ſince the edict of 1716. In one (b) of them, which happened in 1738, a negro had been brought from the iſland of Saint Domingo without obſerving the terms

(z) Nouvelles Deciſions par M. Deniſart, tit. Negres, ſ. 27.

(a) M. Deniſart obſerves, that the edict of 1716, and the declaration of 1738, do not appear to have been ever regiſtered by the parliament of Paris, becauſe they are conſidered as contrary to the common law of the kingdom.—See his *Nouvelles Deciſions*, tit. Negres.

(b) See Cauſes Celebres, vol. 13. p. 492.

of

of the edict 1716; and in the other (*d*), which was decided ſo late as in the year 1758, a ſlave had been brought from the Eaſt Indies, to which the edict doth not extend: and in both theſe caſes the ſlaves were declared to be free.

SUCH are the examples drawn from the laws and uſages of other European countries; and they fully evince, that wherever it is the policy to diſcountenance ſlavery, a diſregard of the *lex loci*, in the caſe of ſlavery, is as well juſtified by general *practice*, as it is really founded on *neceſſity*. Nor is the *juſtice* of ſuch proceeding leſs evident; for how can it be unjuſt to *deveſt* the maſter's property in his ſlave, when he is carried into a country, in which, for the wiſeſt and moſt humane reaſon, ſuch property is known to be prohibited, and conſequently cannot be lawfully introduced?

6. IT may be contended, that though the law of England will not receive the negro as a ſlave, yet it may ſuſpend the ſevere qualities of the ſlavery whilſt the negro is in England, and preſerve the maſter's right over him in the relation of a ſervant, either by preſuming a contract for that purpoſe, or, without the aid of ſuch a refinement, by compulſion of law grounded on the condition of ſlavery in which the negro was previous to his arrival here.

(*d*) Nouvelles Deciſions par M. Deniſart, tit. Negres, ſ. 147.

But inſuperable difficulties occur againſt modifying and qualifying the ſlavery by this artificial refinement. In the preſent caſe, at all events ſuch a modification cannot be allowable, becauſe in the return, the maſter claims the benefit of the relation between him and the negro in the full extent of the original ſlavery. But for the ſake of ſhewing the futility of the argument of modification, and in order to prevent a future attempt in the maſters of negroes to avail themſelves of it, I will try its force.

As to the preſuming a contract of ſervice againſt the negro, I aſk at what time is it's commencement to be ſuppoſed? If the time was before the negro's arrival in England, it was made when he was in a ſtate of ſlavery, and conſequently without the power of contracting. If the time preſumed was ſubſequent, the preſumption muſt begin the moment of the negro's arrival here, and conſequently be founded on the mere fact of that arrival, and the conſequential enfranchiſement by operation of law. But is not a ſlavery determined *againſt* the conſent of the maſter, a ſtrange foundation for preſuming a contract between him and the ſlave? For a moment, however, I will allow the reaſonableneſs of preſuming ſuch a contract, or I will ſuppoſe it to be reduced into writing; but then I aſk what are the terms of this contract? To anſwer the maſter's purpoſe, it muſt be a contract to ſerve the maſter here, and when he leaves this country to return with him into America, where the ſlavery will again attach upon the negro. In

plain

plain terms, it is a contract to go into ſlavery whenever the maſter's occaſions ſhall require. Will the law of England diſallow the introduction of ſlavery, and therefore emancipate the negro from it; and yet give effect to a contract founded ſolely upon ſlavery, in ſlavery ending? It is impoſſible that the law of England can be ſo inſulting to the negro, ſo inconſiſtent with itſelf.

THE argument of modification, excluſive of contract, is equally deluſive.—There is no known rule, by which the court can guide itſelf in a *partial* reception of ſlavery. Beſides, if the law of England would receive the ſlavery of the negro in any way, there can be no reaſon why it ſhould not be admitted in the ſame degree as the ſlavery of the villein: but the argument of modification neceſſarily ſuppoſes the contrary; becauſe if the ſlavery of the negro was received in the ſame extent, then it would not be neceſſary to have recourſe to a *qualification*. But there is one other reaſon ſtill more repugnant to the idea of modifying the ſlavery. If the law of England would modify the ſlavery, it would certainly take away it's *moſt* exceptionable qualities, and leave thoſe which are *leaſt* oppreſſive. But the modification required will be inſufficient for the maſter's purpoſe, unleſs the law leaves behind a quality the *moſt* exceptionable, odious, and oppreſſive; an *arbitrary* power of reviving the ſlavery in it's full extent, by removal of the negro to a place, in which the ſlavery

will again attach upon him with all its *original* severity (*e*).

FROM this examination of the ſeveral objections in favour of ſlavery in England, I think myſelf well warranted to obſerve, that inſtead of being weakened, the arguments againſt ſlavery in England have derived an additional force. The reſult is, not merely that negroes become free on being brought into this country, but that the law of England confers the *gift* of *liberty intire* and *unincumbered*; not in *name* only, but *really* and *ſubſtantially*; and conſequently, that Mr. Steuart cannot have the leaſt right over Sommerſett the negro, either in the *open* character of a ſlave, or in the *diſguiſed* one of an ordinary ſervant.

(2,) Point on Mr. Steuart's authority to enforce his right to the negro by tranſporting him out of England.

(2,) IN the outſet of the argument I made a ſecond queſtion on Mr. Steuart's authority to enforce his right,

(*e*) This anſwer to the argument of modification, includes an anſwer to the ſuppoſition, that an action of *treſpaſs per quod ſervitium amiſit*, will lie for loſs of a negro's ſervice. I am perſuaded, that the caſe in which that remedy was looſely ſuggeſted, was one in which the queſtion was about a negro *being out of England*. See the caſe of *Smith* and *Gould*, Salk. 667.—Another writ juſt hinted at in the ſame caſe, is the writ of *treſpaſs, quare captivum ſuum cepit*; which is not in the leaſt applicable to the negro, or any other ſlave. It ſuppoſes the plaintiff to have had one of the king's enemies in his cuſtody as a priſoner of war, and to have had a right of detaining him till payment of a ranſom. See Reg. Br. 102. b. and Salk. 667.

if

if he has any, by tranſporting the negro out of England. Few words will be neceſſary on this point, which my duty as counſel for the negro requires me to make, in order to give him *every poſſible* chance of a diſcharge from his confinement, and not from any doubt of ſucceſs on the queſtion of ſlavery.

If in England the negro continues a ſlave to Mr. Steuart, he muſt be content to have the negro ſubject to thoſe limitations which the laws of villenage impoſed on the lord in the enjoyment of his property in the villein; there being no other laws to regulate ſlavery in this country. But even thoſe laws did not permit that high act of dominion which Mr. Steuart has exerciſed; for they reſtrained the lord from forcing the villein out of England. The law, by which the lord's power over his villein was thus limited, has reached the preſent times. It is a law * made in the time of the Firſt William, and the words of it are, *prohibemus ut nullus vendat hominem extra patriam* (*f*).

If Mr. Steuart had claimed the negro as a ſervant by contract, and in his return to the *habeas corpus* had ſtated a *written* agreement to leave England as Mr. Steuart ſhould require, ſigned by the negro, and made

* Wilk. Leg. Saxon. p. 229. & cap. 65. Leg. Gulielm. I.

(*f*) This law furniſhes one more argument againſt ſlavery imported from a foreign country. If the law of England did not diſallow the admiſſion of ſuch a ſlavery, would it reſtrain the maſter from taking his ſlave out of the kingdom?

after

after his arrival in England, when he had a capacity of contracting, it might then have been a queſtion, Whether ſuch a contract in *writing* would have warranted Mr. Steuart in compelling the performance of it, by *forcibly* tranſporting the negro out of this country? I am myſelf ſatisfied, that no contract, however *ſolemnly* entered into, would have juſtified ſuch violence. It is contrary to the genius of the Engliſh law, to allow any enforcement of agreements or contracts by any other compulſion than that from our courts of juſtice. The exerciſe of ſuch a power is not lawful in caſes of agreements for *property*; much leſs ought it to be ſo for enforcing agreements againſt the *perſon*. Beſides, is it reaſonable to ſuppoſe that the law of England would permit *that* againſt *the ſervant by contract*, which is denied againſt the *ſlave?* Nor are great authorities wanting to acquit the law of England of ſuch an inconſiſtency, and to ſhew that a contract will not warrant a compulſion by *impriſonment*, and conſequently much leſs by *tranſporting the party out of this kingdom*. Lord Hobart, whoſe extraordinary learning, judgment, and abilities, have always ranked his opinion amongſt the higheſt authorities of law, expreſly ſays (*g*), that the *body of a freeman cannot be made ſubject to diſtreſs or impriſonment by contract, but only by judgment*. There is, however, *one* caſe, in which it is ſaid that the performance of a *ſervice to be done abroad*, may be compelled without the intervention of a court of juſtice; I mean,

(*g*) Hob. 61.

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the caſe of an *infant-apprentice*, bound by proper indentures to a mariner or other perſon, where the nature of the ſervice imports, that it is to be done out of the kingdom (*b*), and the party, by reaſon of his *infancy*, is liable to a coercion not juſtifiable in *ordinary* caſes. The *habeas corpus* act (*i*) goes a ſtep further, and perſons who, *by contract in writing*, agree with a merchant or owner of a plantation, or any other perſon, to be tranſported beyond ſea, and receive earneſt on ſuch agreements, are excepted from the benefit of that ſtatute. I muſt ſay, that the exception appears very *unguarded*; and if the law, as it was *previous* to this ſtatute, did intitle the ſubject to the *habeas corpus* in the caſe which the ſtatute excepts, it can only operate in excluding him in that particular caſe from the *additional* proviſions of the ſtatute, and cannot, I preſume, be juſtly extended to deprive him of the *habeas corpus*, as the common law gave it before the making of the ſtatute.

Upon the whole, the return to the *habeas corpus* in the preſent caſe, in whatever way it is conſidered, whether by inquiry into the foundation of Mr. Steuart's right to the perſon and ſervice of the negro, or by reference to the violent manner in which it has been attempted to enforce that right, will appear equally un- Concluſion.

(*b*) Hob. 134.

(*i*) 31. Cha. II. c. 2. ſ. 13.

worthy

worthy of this court's approbation. By considering the return, the revival of domestic slavery will be rendered as impracticable by *invasion* from our colonies and from other countries, as it is by *enactment* here. Such a judgment will be no less conducive to the public advantage, than it will be conformable to natural justice, and to principles and authorities of law; and this Court, by effectually obstructing the admission of the *new slavery of negroes* into England, will in *these times* reflect as much honor on themselves, as the great judges, their predecessors, *formerly* acquired, by contributing so uniformly and successfully to the suppression of the *old slavery of villenage*.

FINIS.

ERRATA.

P. 16. l. 9. for *decide* read *derive*.
P. 26. l. 1, dele *and*.